HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

THE QUEEN PROSECUTOR

AND

CRAIG ALLAN HUGHES DEFENDANT

The Queen v Hughes [2000] HCA 22
3 May 2000
P58/1999

ORDER

The questions in the Case Stated are answered as follows:

1. Is s 45 of the *Corporations Act* 1989 (Cth) ("the Corporations Act") as amended by s 4(1) of the *Corporations Legislation Amendment Act* 1990 (Cth) a valid exercise of legislative power of the Commonwealth of Australia in so far as, with respect to Western Australia, it purports to require offences to be "taken to be" offences against the "laws of the Commonwealth"?

   Answer: Unnecessary to answer.

2. If yes, against which laws of the Commonwealth are the offences alleged in the indictment committed?

   Answer: Unnecessary to answer.

3. Is s 43(2) of the Corporations Act a valid and effective conferral of function or power upon "an officer or authority" of the Commonwealth to prosecute offences against the Corporations Law of Western Australia?

   Answer: Unnecessary to answer.

4. Is s 29 of the *Corporations (Western Australia) Act* 1990 (WA) ("the WA Corporations Act") a valid exercise of the legislative power

of the Parliament of Western Australia in so far as it purports to create offences which are "taken to be" offences against the laws of the Commonwealth?

Answer: Section 29 is a valid law of the State of Western Australia and operates according to its terms.

5. If offences by the WA Corporations Act are "taken to be" offences against the laws of the Commonwealth, against which laws of the Commonwealth are the offences alleged in the indictment committed?

Answer: Unnecessary to answer.

6. Are offences which, by the WA Corporations Act, are "taken to be" offences against the laws of the Commonwealth, offences against the laws of the Commonwealth or offences against the laws of Western Australia?

Answer: Given the answer to question 9, unnecessary to answer.

7. Do ss 31 and 33 of the WA Corporations Act constitute a valid and effective conferral of function or power upon "an officer or authority of the Commonwealth" to prosecute offences against the Corporations Law of Western Australia?

Answer: As to s 31, yes, but subject to the answer to question 8. As to s 33, unnecessary to answer.

8. By what legislative authority is the Commonwealth Director of Public Prosecutions empowered to exercise the purported conferral, pursuant to ss 31 and 33 of the WA Corporations Act, of function or power to prosecute offences against the Corporations Law of Western Australia?

Answer: Section 31 of the WA Corporations Act (in combination with s 29(1) of that Act) and s 9(2)(a) of the *Director of Public Prosecutions Act* 1983 (Cth) (in combination with reg 3(1)(d) of the Corporations (Commonwealth Authorities and Officers) Regulations made pursuant to ss 47 and 73 of the Corporations Act).

9. Does the indictment in the matter herein disclose an offence known to the law of:

(a) the Commonwealth?

(b) the State of Western Australia?

(c) the Australian Capital Territory?

Answer: The indictment discloses offences known to the law of Western Australia.

Representation:

D J Bugg QC with S J Gageler and P N Bevilacqua for the prosecutor (instructed by Commonwealth Director of Public Prosecutions)

R Richter QC with S A Shirrefs for the defendant (instructed by Fiocco Hopkins Nash)

Interveners:

H C Burmester QC, Acting Solicitor-General of the Commonwealth with G Witynski and M A Perry intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

D Graham QC, Solicitor-General for the State of Victoria with S G E McLeish intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

R J Meadows QC, Solicitor-General for the State of Western Australia with C F Jenkins intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

CATCHWORDS

The Queen v Hughes

Constitutional Law (Cth) – Accused made available in Perth "prescribed interests" relating to transactions to be carried out in the United States of America – Prohibition of offering of "prescribed interests" in undertakings to be performed "whether in Australia or elsewhere" – Director of Public Prosecutions of the Commonwealth instituted prosecution on indictment for making available "prescribed interests" contrary to s 1064(1) and s 1311(1)(a) of the Corporations Law of Western Australia – Whether Director of Public Prosecutions of the Commonwealth had power to prosecute accused – Whether any offence known to the law – Whether offence against the laws of the Commonwealth or of Western Australia – Whether Director of Public Prosecutions of the Commonwealth validly authorised to receive power to prosecute State offences – Whether Director of Public Prosecutions of the Commonwealth validly subjected to a duty to exercise power to prosecute State offences.

Constitutional Law (WA) – Whether Western Australian laws gave power to prosecute offences to the Director of Public Prosecutions of the Commonwealth – Whether State laws invalid as purporting to convert offences against State law into offences against federal law – Whether State laws invalid as constituting an abdication of State legislative power – Whether State laws invalid for want of sufficient specification.

Companies – Corporations Law – Interrelated federal, State and Territory legislation – Offences against Corporations Law of Western Australia – Whether offence against the laws of the Commonwealth or of Western Australia – Whether Director of Public Prosecutions of the Commonwealth validly authorised to prosecute offences against State law – Constitutional validity of interrelated legislation as applicable to the offence alleged.

Criminal Law and Practice – Companies – Offence against law of Western Australia – Whether Director of Public Prosecutions of the Commonwealth validly authorised to prosecute offence.

Words and phrases – "Commonwealth law" – "is taken to be".

Constitution, ss 51(i), 51(xx), 51(xxix), 51(xxxix).
Corporations Act 1989 (Cth), ss 46, 47, 73, 82.
Corporations Law, ss 1064(1), 1311(1)(a).
Director of Public Prosecutions Act 1983 (Cth), ss 5(2), 6, 7, 8, 9.
Corporations (Commonwealth Authorities and Officers) Regulations 1990 (Cth), reg 3(1)(d).
Corporations (Western Australia) Act 1990 (WA), ss 7, 26, 28, 29, 31, 32, 33.

1 GLEESON CJ, GAUDRON, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ. The Full Court has before it questions concerning the construction and validity of certain provisions of what generally is identified as the national scheme for corporate regulation. This replaced the previous co-operative scheme and was established pursuant to heads of agreement formulated at a meeting of representatives of the Executive Governments of the Commonwealth, the States and the Northern Territory at Alice Springs in June 1990 ("the Alice Springs Agreement")[1]. The national scheme was implemented by legislation of the legislatures of all the polities that were parties to the Alice Springs Agreement[2]. In construing that legislation, regard may be had to the Alice Springs Agreement as part of the relevant context[3].

2 This case concerns the provisions of legislation of the Commonwealth and Western Australia respecting the institution and conduct of prosecutions under the national scheme. The decisions of this Court in *Byrnes v The Queen*[4] and *Bond v The Queen*[5] are not determinative of the issues now arising. The earlier cases concerned the competency of appeals by the prosecution against sentences imposed upon conviction for offences under the co-operative scheme, not the national scheme.

The issues

3 By indictment dated 15 July 1997 and presented to the District Court of Western Australia, Craig Allan Hughes ("the accused"), with Noel Andrew Bell, is prosecuted on three counts of making available at Perth, between 1 February 1992 and 24 November 1994, "prescribed interests" contrary to s 1064(1) of the Corporations Law ("the Law") read with s 1311(1)(a) of the Law. The indictment opens with the words:

> "The Commonwealth Director of Public Prosecutions ['the DPP'] who prosecutes in this behalf for Her Majesty the Queen …"

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1 The parties to the Alice Springs Agreement are now parties to an agreement styled *Corporations Agreement* made on 23 September 1997. Clause 1006 thereof provides for the former agreement to cease to have effect.

2 The origins and structure of the national scheme are further outlined in *Gould v Brown* (1998) 193 CLR 346 at 393-394, 413-415, 433-437.

3 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.

4 (1999) 73 ALJR 1292; 164 ALR 520.

5 (2000) 74 ALJR 597; 169 ALR 607.

and is signed:

> "IAN RUSSELL BERMINGHAM
> for and on behalf of the Commonwealth
> Director of Public Prosecutions".

The DPP holds an office established by s 5(2) of the *Director of Public Prosecutions Act* 1983 (Cth) ("the DPP Act"). Section 6 details various functions of the DPP and s 9 confers various powers to be exercised for the purpose of the performance of those functions. One of the functions of the DPP is to institute and carry on prosecutions on indictment for indictable offences against the laws of the Commonwealth (s 6(1)(a), (b)). However, the DPP contends that, by reason of other provisions in the DPP Act and of the operation of other Commonwealth and State laws, in the present case he is prosecuting for offences against the laws of Western Australia. It will be necessary to determine whether this is so and, if so, whether the DPP is competent to act in that fashion. The accused denies that competence.

4 On 8 August 1997, the accused and Mr Bell were arraigned and pleaded not guilty. On 23 August 1999 the accused applied to the District Court on motion to quash the indictment. Thereafter, this Court ordered the removal under s 40 of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act") of so much of the cause pending in the District Court as is involved in the motion to quash the indictment. The parties then agreed certain facts for the purposes of the proceeding in the High Court and there is now before the Full Court, pursuant to an order made by a Justice under s 18 of the Judiciary Act, a number of questions for determination.

5 As indicated above, the accused submits that there is lacking the necessary legislative authority under Commonwealth and State law for the DPP to prosecute the offences specified in the indictment. It is also asserted that the relevant State and Commonwealth legislation is not effective to render the accused liable to any prosecution for the offences alleged. In particular, the accused contends that the effect of the State legislation is to render offences against State law offences against Commonwealth law. Such a transmutation is said to be beyond the competence of the State legislature.

6 The reference already made to "the Law" is to the Corporations Law set out in s 82 of the *Corporations Act* 1989 (Cth) ("the Corporations Act"). Section 7 of the *Corporations (Western Australia) Act* 1990 (WA) ("the WA Corporations Act") provides:

"The Corporations Law set out in section 82 of the Corporations Act as in force for the time being –

(a) applies as a law of Western Australia; and

(b) as so applying, may be referred to as the Corporations Law of Western Australia."

Paragraph (a) of s 1311(1) of the Law renders guilty of an offence, by reason of that sub-section, a person who does an act or thing that the person is forbidden to do by or under a provision of the Law.

7 Section 1064(1) of the Law stated:

"A person, other than a public corporation, must not make available, offer for subscription or purchase, or issue an invitation to subscribe for or buy, any prescribed interest."

The section did not apply in relation to a prescribed interest that was an interest in a partnership agreement (s 1064(8)).

8 Section 1064 was removed from the Law with effect from 1 July 1998 by the *Managed Investments Act* 1998 (Cth)[6]. This had a corresponding effect upon the operation of s 7 of the WA Corporations Act and thus upon the Corporations Law of Western Australia. However, it is not contended that the repeal affected any liability to prosecution and punishment which had been incurred before the repeal.

9 The term "prescribed interest" was defined in s 9 of the Law as including "a participation interest" and, in turn, that term was defined, with certain exclusions, as meaning any right to participate, or any interest:

"(a) in any profits, assets or realisation of any financial or business undertaking or scheme *whether in Australia or elsewhere*;

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6 Item 143 of Sched 2 Pt 1 repealed Div 5 of Pt 7.12 of the Law. Division 5 was headed "Prescribed interests" and comprised ss 1063-1076. Items 22, 23 and 25 thereof respectively repealed the definitions in s 9 of the Law of "participation interest", "prescribed interest", and "public corporation".

(b) in any common enterprise, *whether in Australia or elsewhere*, in relation to which the holder of the right or interest is led to expect profits, rent or interest from the efforts of the promoter of the enterprise or a third party; or

(c) in any investment contract". (emphasis added)

The phrase "investment contract" is defined as follows:

> "any contract, scheme or arrangement that, in substance and irrespective of its form, involves the investment of money in or under such circumstances that the investor acquires or may acquire an interest in, or right in respect of, property, *whether in this jurisdiction or elsewhere*, that, under, or in accordance with, the terms of investment will, or may at the option of the investor, be used or employed in common with any other interest in, or right in respect of, property, *whether in this jurisdiction or elsewhere*, acquired in or under like circumstances". (emphasis added)

10 The prosecution case against the accused and Mr Bell involves a group of investors in Australia putting money offshore through a United States securities house under an arrangement whereby the money (with profit) would be returned to the investors in Australia. The DPP contends that the case falls within the scope of pars (a), (b) and (c) of the definition of "participation interest".

11 The case put by the DPP as that on which he prosecutes may be summarised as follows. At all material times, Mr Bell was a finance broker and early in 1992 he and the accused agreed to procure the provision by an investment group of $300,000 with Mr Bell raising the moneys from investors in Western Australia and the accused undertaking in the United States the arrangements for the completion of the investment scheme and the remission of the profits back to the investors through Mr Bell's company, less the commission agreed for the accused and Mr Bell. A total of $300,000 was raised in this way. The moneys were held in a trust account maintained at the National Australia Bank by a firm of solicitors. They were transferred by telegraphic transfer from that account to an account operated in the United States by a United States securities house, PaineWebber Incorporated. The investors had been told that the transaction, involving the transfer of funds to the United States to facilitate a purchase order for bank bills between two international banks outside Australia, would take 90 days to complete and that the investors could double their money. However, following various requests, only the principal sum was repaid and this not until late 1994.

The authority of the DPP

12 The issues which arise require an understanding of the statutory sources of the function performed by the DPP in this prosecution.

13 The involvement of the Attorney-General for the Commonwealth ("the Attorney-General") in the administration of the DPP Act should first be noted. If requested to do so by the Attorney-General, the DPP is obliged by the DPP Act to consult with the Attorney-General with respect to matters concerning the performance of the DPP's functions or the exercise of the DPP's powers (s 7(1)). Likewise, if requested to do so by the DPP, the Attorney-General is required to consult with the DPP with respect to matters concerning the performance of the DPP's functions or the exercise of the DPP's powers (s 7(2)). Further, in the performance of the DPP's functions and in the exercise of the DPP's powers, the DPP is subject to such directions or guidelines as the Attorney-General, after consultation with the DPP, gives or furnishes to the DPP by instrument in writing (s 8(1)). Those directions or guidelines may be given or furnished in relation to particular cases (s 8(2)(c)) and may relate to the circumstances in which the DPP shall institute or carry on prosecutions for offences (s 8(2)(a)).

14 In addition to those functions specified in s 6(1), the functions of the DPP include "functions that are conferred" on the DPP "by or under any other law of the Commonwealth" (s 6(2)(a)). This invites attention to Div 3 (ss 46-48) of Pt 8 (ss 37-48) of the Corporations Act. Section 3(1) of that Act specifies the object of the statute as follows:

> "The object of this Act (*other than Part 8*) is to make a law for the government of the Australian Capital Territory in relation to corporations, securities, the futures industry and some other matters." (emphasis added)

15 Division 3 of Pt 8 is headed "Performance of functions that corresponding laws of States confer on Commonwealth authorities and officers". From this heading, as well as from the reservation in respect of Pt 8 from the statement of object in s 3(1), it is apparent that Div 3 is not merely a law for the government

of the Australian Capital Territory. No other head of power is specified. However, as Starke J observed 75 years ago[7]:

> "A law enacted by a Parliament with power to enact it, cannot be unlawful. The question is not one of intention but of power, from whatever source derived."

16 Section 46, the first provision in Div 3, deals with the position of Ministers. It states:

> "A Minister has such functions and powers as are expressed to be conferred on him or her by or under a corresponding law."

The term "Minister" identifies one of the Queen's Ministers of State for the Commonwealth appointed under s 64 of the Constitution[8]. The Attorney-General, in respect of the administration of the DPP Act, is such a Minister within the meaning of s 46. The term "corresponding law", as used in Pt 8, is defined in s 38 of the Corporations Act. For present purposes, "corresponding law" means a statute of a jurisdiction other than the Australian Capital Territory that "corresponds" to the Corporations Act. The WA Corporations Act is such a "corresponding law".

17 Further, in addition to the express provision made with respect to Ministers by s 46, s 47(1) states:

> "Regulations under section 73 may provide that prescribed authorities and officers of the Commonwealth have prescribed functions and powers that are expressed to be conferred on them by or under corresponding laws."

Section 73 of the Corporations Act empowers the Governor-General to make regulations prescribing matters, so far as presently relevant, required or permitted by Pt 8 to be prescribed. Regulation 3(1)(d) of the Corporations (Commonwealth

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7 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 135. See also the observations to similar effect of Windeyer J in *Spratt v Hermes* (1965) 114 CLR 226 at 278.

8 See *Acts Interpretation Act* 1901 (Cth) ("the Interpretation Act"), s 17(h).

Authorities and Officers) Regulations[9] ("the Regulations") provides that the DPP is one of the officers of the Commonwealth who has the functions and powers expressed to be conferred on them by or under a corresponding law[10].

State law

18 The question then arises as to whether the WA Corporations Act, as such a corresponding law, has conferred on the DPP the function or power of instituting and conducting the prosecution the subject of the indictment of the accused.

19 The answer depends upon the construction of the provisions of ss 28, 29 and 31-33 of the WA Corporations Act. These provisions are found in Div 2 of Pt 8 (ss 26-39). Part 8 is headed "NATIONAL ADMINISTRATION AND ENFORCEMENT OF THE CORPORATIONS LAW". An object of Pt 8 is stated in s 26(a) as being to help ensure that the Corporations Law of Western Australia and the Corporations Law of each jurisdiction other than Western Australia are administered and enforced on a national basis "in the same way as if those Laws constituted a single law of the Commonwealth". This expression of legislative intention reflects the terms of cl 26.1 of the Alice Springs Agreement. This stated that one of the "fundamentals" of the new "application of laws" regime was to be the amendment of the Corporations Act to apply as law for the Australian Capital Territory "which will then be applied in each State as a law of that State".

20 Section 28(1) is the first provision in Div 2 of Pt 8 of the WA Corporations Act. It states that an object of Div 2 is to further the object of Pt 8 by providing (s 28(1)(a)):

> "for an offence against an applicable provision of Western Australia to be treated as if it were an offence against a law of the Commonwealth".

21 Where, by reason of the operation of Div 2, a function or power is conferred on an officer or authority of the Commonwealth, that function or power may not be performed or exercised by an officer or authority of Western

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9 SR No 457/1990, amended by SR No 311/1991.

10 See *Byrnes v The Queen* (1999) 73 ALJR 1292 at 1296-1297; 164 ALR 520 at 526-528.

Australia. Section 33 so specifies. This provision appears to have been designed to implement cl 27.1 of the Alice Springs Agreement. This stated that the DPP was to "have responsibility" for the prosecution of offences under the new national scheme legislation. Undoubtedly this responsibility includes the exercise of what in argument was referred to as the "prosecutorial discretion"[11]. But it also is apparent that the responsibility which is withdrawn by the State legislation from State authorities is to be conferred on officers or authorities of the Commonwealth as a matter of obligation to which they are subjected, not as a power or function the exercise of which by them is merely permitted.

22 Section 29 uses the expression "[t]he Commonwealth laws". "Commonwealth law" is defined in s 3(1) as meaning "any of the written or unwritten laws of the Commonwealth, including laws about the exercise of prerogative powers, rights and privileges …". The definition excludes from its operation certain statutes, in particular the Law. This is identified in the definition as "the Corporations Law of the [Australian] Capital Territory". (The exclusion avoids a risk of repetition and circularity: the Law is already "picked up" by s 7 of the WA Corporations Act, the text of which is set out earlier in these reasons.) What is significant for present purposes is that the term "Commonwealth law" is apt to include the DPP Act. Section 29(1) then operates, for present purposes, by stating that the DPP Act applies as a law of Western Australia in relation to an offence against provisions of the Corporations Law of Western Australia "as if" those provisions were not laws of Western Australia but were laws of the Commonwealth[12].

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11 cf *Barton v The Queen* (1980) 147 CLR 75.

12 Section 29(1) states:

> "The Commonwealth laws apply as laws of Western Australia in relation to an offence against the applicable provisions of Western Australia as if those provisions were laws of the Commonwealth and were not laws of Western Australia."

The term "applicable provision", in relation to Western Australia, is defined in s 3(1) of the WA Corporations Act as including the provisions of the Corporations Law of Western Australia. The definition in s 3(1) uses the expression "the Corporations Law". But s 11(1) states that the Corporations Law of Western Australia "may be referred to simply as the Corporations Law".

23 Then, "[f]or the purposes of a law of Western Australia", s 29(2) provides that an offence against the Corporations Law of Western Australia "is taken to be" an offence against the laws of the Commonwealth (again, as if the Corporations Law of Western Australia were a law of the Commonwealth) and not "an offence against the laws of Western Australia"[13]. It is significant that s 29(2) is expressed to apply "[f]or the purposes of a law of Western Australia". This indicates that the State legislature is not purporting to dictate to the Commonwealth Parliament what are Commonwealth laws. Rather, it is requiring certain of the laws of Western Australia to be treated as if they were Commonwealth laws for the purposes of Western Australian law.

24 The phrases "as if" (in s 29(1)) and "is taken to be" (in s 29(2)) no doubt appeared to those drawing those provisions to be, in Windeyer J's words[14], "a convenient device for reducing the verbiage of an enactment". The terms used in s 79 of the Judiciary Act to "pick up" certain State laws as surrogate federal laws also may have given some inspiration[15]. Perhaps paradoxically, it is to be expected that this very lack of verbiage will give rise to various textual awkwardnesses. Some of these were debated in the course of submissions in the present case. They are distractions from the issues presently before the Full Court.

25 It should, however, be noted that some foresight as to the difficulties that may arise is apparent from the text of s 32. This is directed to the situation where, for example, in a provision of the DPP Act, there is a reference to another provision of that statute or to another Commonwealth law. In such a case, the

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13 The text of s 29(2) is as follows:

> "For the purposes of a law of Western Australia, an offence against the applicable provisions of Western Australia –
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> (a) is taken to be an offence against the laws of the Commonwealth, in the same way as if those provisions were laws of the Commonwealth; and
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> (b) is taken not to be an offence against the laws of Western Australia."

14 *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 at 65.

15 cf *Pedersen v Young* (1964) 110 CLR 162 at 165-166; *Northern Territory v GPAO* (1999) 196 CLR 553.

reference is to be taken, for the purposes of s 29, "to be a reference to that provision as applying because of that section" (s 32).

26 Section 29 is not invalid as an exercise of State legislative power because it represents an "abdication" rather than the exercise of such an authority. There is no such principle applicable here. The authorities rejecting submissions to this effect are collected in *Byrnes v The Queen*[16]. Section 29 does not deny or displace the binding effect upon the courts, judges and people of Western Australia given, by covering cl 5 of the Constitution, to the Constitution and laws made by the Parliament of the Commonwealth. Nor is s 29 defective for want of sufficient specification of the command which, in an Austinian sense, it directs to the community[17]. Difficulties of interpretation by reason of such a "pick up" provision may arise from case to case but that prospect does not entail invalidity. The submissions by the accused respecting the alleged invalidity of s 29 and cognate provisions of the WA Corporations Act should be rejected.

27 For present purposes, namely the decision whether the indictment of the accused should be quashed, the DPP Act is rendered applicable as a law of Western Australia in relation to the offences against the Corporations Law of Western Australia which are the subject of the indictment. Section 31(1) is thus enlivened. It states:

> "A Commonwealth law applying because of section 29 that confers on an officer or authority of the Commonwealth a function or power in relation to an offence against the applicable provisions of the [Australian] Capital Territory also confers on the officer or authority the same function or power in relation to an offence against the corresponding applicable provision of Western Australia."

28 The functions of the DPP under pars (a) and (b) of s 6(1) of the DPP Act include the institution and carrying on of prosecutions on indictment for indictable offences against the laws of the Commonwealth, including s 1064(1) and s 1311(1)(a) of the Law. Powers relevant to that function are contained in s 9 of the DPP Act. It follows that, as a matter of Western Australian law, the

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16 (1999) 73 ALJR 1292 at 1294; 164 ALR 520 at 524.

17 cf the observations of Dawson J in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 76 respecting Austinian theory.

corresponding function or power is conferred on the DPP in relation to offences against s 1064(1) and s 1311(1)(a) of the Corporations Law of Western Australia.

29 Furthermore, the functions or powers of the Attorney-General conferred by ss 7 and 8 of the DPP Act in respect of the performance of the functions and powers of the DPP are, with respect to offences against the Corporations Law of Western Australia, conferred upon the Attorney-General as a matter of Western Australian law.

Commonwealth law

30 It is here that s 46 of the Corporations Act comes into play. The effect of that provision is that, as a matter of Commonwealth law, the Attorney-General "has such functions and powers as are expressed to be conferred on him or her by or under [the WA Corporations Act]". With respect to the DPP, it is the provisions of s 47 of the Corporations Act and of reg 3(1)(d) of the Regulations which operate, as a matter of Commonwealth law, to specify that that officer has the functions and powers expressed to be conferred on him or her by the WA Corporations Act[18].

31 It may be accepted that, subject to what may be the operation of negative implications arising from the Constitution, for example Ch III, in the exercise of the incidental power the Parliament may permit officers of the Commonwealth holding appointments by or under statute to perform functions and accept appointments in addition to their Commonwealth appointments. Provisions such as s 46 and s 47 illustrate two further propositions. The first is that a State by its laws cannot unilaterally invest functions under that law in officers of the Commonwealth; the second is that a State law which purported to grant a wider power or authority than that the acceptance of which was prescribed by

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18 Questions before the Full Court include questions respecting the validity of ss 43 and 45 of the Corporations Act. These appear in Div 2 of Pt 8. The stated object of Div 2 (ss 40-45) is to provide for the treatment in the Australian Capital Territory of laws such as the Corporations Law of Western Australia (s 40(1)). Accordingly, ss 43 and 45 have no application to the present prosecution and may be put to one side. See *Byrnes v The Queen* (1999) 73 ALJR 1292 at 1305-1306; 164 ALR 520 at 539-540.

Commonwealth law would, to that extent, be inconsistent with the Commonwealth law and invalid under s 109 of the Constitution[19].

32 However, those propositions do not exhaust the operation of s 47 in the present matter; nor do they explain the operation of s 46. In particular, they do not provide a basis for the imposition by federal law upon Commonwealth officers of duties to perform functions or exercise powers created and conferred by State law. Such a federal law must be supported by a head of power. As indicated earlier in these reasons, the effect of the national scheme was to substitute the Commonwealth prosecution apparatus for that of the relevant State. State functionaries were directed by State law, in this case by s 33 of the WA Corporations Act, not to perform or exercise functions or powers conferred by the State legislation upon an officer or authority of the Commonwealth.

33 It is submitted, principally by the DPP and the Attorney-General who intervened in his support, that reg 3(1)(d) of the Regulations and the federal laws which support it involve no more than an approval or consent to the exercise of State functions and powers by the DPP. It is said that the State provisions simply purport to confer powers upon the DPP, whose exercise may be the subject of general directions by the Attorney-General under s 8 of the DPP Act. However, what is involved in the federal legislation is more than consent or permission by the Commonwealth to the exercise by its officers of additional functions and powers derived entirely from State law. These additional functions and powers are imposed by federal law as a matter of duty or obligation, lest there be an abdication of State authority with no certainty of its effective replacement.

34 We have stated above our acceptance of a proposition as to permissive provisions respecting the exercise of additional functions by Commonwealth officers. Whether the further step taken here of imposing duties by Commonwealth law was necessary not merely to implement the agreement between the respective Executive Governments, but as a constitutional imperative, we need not stay to consider. The immediate point is that, the step having been taken, the federal law taking it required support by an available head of power.

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19 *Bond v The Queen* (2000) 74 ALJR 597 at 600; 169 ALR 607 at 610. See also *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 426-427, 447, 452-453, 472-473, 506-507.

35 To adapt what was said by Deane J in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*[20], what is involved here is more than an indication by the Commonwealth Parliament of "a negative intention not to cover the field"; rather, there is a "positive provision" which vests "ancillary powers which the Commonwealth Parliament could alone confer". Moreover, as the Attorney-General for the State of Victoria points out, it is the operation of Commonwealth law which enables the DPP to expend Commonwealth resources in exercise of powers and functions "conferred" by State law.

36 These points may be emphasised by reference to s 46 of the Corporations Act. This operates in the present case to direct the Attorney-General with respect to the exercise of the powers in relation to the DPP conferred on the Attorney-General by ss 7 and 8 of the DPP Act. The Executive Government of the Commonwealth, which is provided for in Ch II of the Constitution (ss 61-70) and of which the Attorney-General is part, involves the execution and maintenance of laws of the Commonwealth, not those of the States.

Validity

37 Reference has been made above to the laws of the Commonwealth which provide for the DPP to institute and conduct the prosecution on indictment of the accused. In particular, the effect of s 47(1) of the Corporations Act is to support the provision in reg 3(1)(d) of the Regulations made under s 73 of that statute that the DPP has the functions and powers conferred by or under the WA Corporations Act. In the course of argument and in supplementary written submissions (filed by leave of the Court), there was some discussion of the validity of the operation of these laws of the Commonwealth with respect to the indictment and prosecution of the accused.

38 It may be that in their present operation these provisions are to be supported as laws with respect to matters incidental to the execution of a power vested by Ch II of the Constitution in the Government of the Commonwealth or in any department or officer of the Commonwealth. That is the language of s 51(xxxix)

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20 (1983) 158 CLR 535 at 592.

of the Constitution. The Alice Springs Agreement may be an illustration of the propositions stated by Mason J in *Duncan*[21]:

> "The scope of the executive power is to be ascertained, as I indicated in the *AAP Case*[22], from the distribution of the legislative powers effected by the Constitution and the character and status of the Commonwealth as a national government. Of necessity the scope of the power is appropriate to that of a central executive government in a federation in which there is a distribution of legislative powers between the Parliaments of the constituent elements in the federation. It is beyond question that it extends to entry into governmental agreements between Commonwealth and State on matters of joint interest, including matters which require for their implementation joint legislative action, so long at any rate as the end to be achieved and the means by which it is to be achieved are consistent with and do not contravene the Constitution."

39 It is plain enough that s 51(xxxix) empowers the Parliament to legislate in aid of an exercise of the executive power. However, it would be another matter to conclude that this means that the Parliament may legislate in aid of any subject which the Executive Government regards as of national interest and concern, a point made by Wilson and Dawson JJ in *Davis v The Commonwealth*[23]. In the same case, Brennan J expressed his opinion that[24]:

> "the legislative power with respect to matters incidental to the execution of the executive power does not extend to the creation of offences except in so far as is necessary to protect the efficacy of the execution by the Executive Government of its powers and capacities".

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21 (1983) 158 CLR 535 at 560. See also *Davis v The Commonwealth* (1988) 166 CLR 79 at 92-95, 101-103, 109-113, 117-119; cf *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839 at 846, 855-856, 863-867, 893; 163 ALR 270 at 280, 293-294, 304-309, 344-345.

22 [*Victoria v The Commonwealth and Hayden*] (1975) 134 CLR 338 at 396-397.

23 (1988) 166 CLR 79 at 102-103.

24 (1988) 166 CLR 79 at 113.

Of course, what is involved in the present case is not the creation of new federal offences but the conduct of prosecutions for State offences. Nevertheless, the scope of the executive power, and of s 51(xxxix) in aid of it, remains open to some debate and this is not a suitable occasion to continue it. This is because it is unnecessary to do so, given the other matters to which we now turn.

40 The DPP Act in a sense is supported by as many heads of power as from time to time have been exercised by the Parliament to create offences against Commonwealth laws. State law may create offences in fields where it would have been competent for the Parliament of the Commonwealth to enter directly by its own offence-creating legislation. The power conferred by s 51(xx) with respect to foreign corporations and trading or financial corporations is an obvious example. In such a situation, a federal law which specifies that certain Commonwealth officers have powers and functions expressed to be conferred by the State law with respect to the prosecution of State offences is a law with respect to that head of federal legislative power. This will be true of perhaps the very great majority of offences created by the State legislation which adopts the Law.

41 There is a question as to whether the "prescribed interest" provision of s 1064(1) could be characterised as a law with respect to corporations within the operation of s 51(xx). Section 1064(1) conferred upon any "public corporation" a privilege in relation to its financial activities by forbidding engagement in such activities to all others[25]. The term "public corporation" was so defined in s 9 of the Law as to include corporations not established as one or more of the corporations in the class identified in s 51(xx) of the Constitution. However, the Attorney-General submits that a corporation which deals with prescribed interests may be characterised as a "financial corporation" for the purposes of s 51(xx) by reason of its engagement in transactions whose subject is finance. In this respect, the Attorney-General relies upon what was said in the joint judgment of Mason, Murphy and Deane JJ in *State Superannuation Board v Trade Practices Commission*[26]. The privilege conferred by s 1064(1) permitted financial corporations to do in relation to their financial activities what other entities were not permitted to do and, the Attorney-General submits, such a law if enacted by the Parliament of the Commonwealth would be supported by

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25 cf *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 336-337.

26 (1982) 150 CLR 282 at 305.

s 51(xx). The Attorney-General contends (and the Attorney-General for the State of Western Australia disputes) that passages in the various judgments in *Re Dingjan; Ex parte Wagner*[27] support that conclusion.

42 It is unnecessary further to consider the matter. Nor is it necessary to consider whether, in so far as the prescribed interests in question here involved the use of the Australian banking system, s 1064(1) could be characterised as a law with respect to "[b]anking, other than State banking" and so supported by s 51(xiii) of the Constitution. This is because the offences with which the accused is charged relate to the making of investments in the United States and thus to trade and commerce with other countries (s 51(i)). They also relate to matters territorially outside Australia, but touching and concerning Australia, and so would attract s 51(xxix)[28].

43 The subsidiary definitions respecting "prescribed interest" which are set out earlier in these reasons were so drawn as to operate "whether in Australia or elsewhere" or "whether in this jurisdiction [Western Australia] or elsewhere". Upon the present hypothesis, a law of the Commonwealth could not take these definitions as criteria of operation for a prosecution unless they were read down to exclude purely domestic dealings of the proscribed varieties. However, s 15A of the Interpretation Act may be applied to read down a provision expressed in general terms, including a power to prosecute so as to apply only where the particular prosecution is supported by a head of power[29]. Consistently with the statement of general principle in the joint judgment in the *Industrial Relations Act Case*[30], this would be achieved by construing the phrase in s 47(1) of the Corporations Act "functions and powers that are expressed to be conferred on them by or under corresponding laws" as limited to those functions and powers in

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27 (1995) 183 CLR 323 at 335 per Mason CJ, 336 per Brennan J, 347 per Dawson J, 353 per Toohey J, 363-365 per Gaudron J, 369 per McHugh J.

28 *Horta v The Commonwealth* (1994) 181 CLR 183 at 193-194.

29 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 at 485-486.

30 *Victoria v The Commonwealth* (1996) 187 CLR 416 at 501-503.

respect of matters within the legislative powers of the Parliament of the Commonwealth[31].

44 Accordingly, the federal legislation identified above (s 47(1) of the Corporations Act and reg 3(1)(d) of the Regulations) operates to provide such authority as is necessary under federal law to support the prosecution by the DPP of the offences against the law of Western Australia which are specified in the indictment.

45 Reference was made in argument to what was decided in *Duncan*[32]. The Attorney-General submits that the legislation whose validity was at issue in *Duncan* may have impliedly imposed duties upon the tribunal and not merely conferred powers. The Attorney-General for the State of Victoria goes further and says that the tribunal plainly had a duty to exercise the powers or jurisdiction conferred on it. That may well be so, but would not undermine the decision in *Duncan*. This is because the several judgments of Mason, Murphy, Brennan and Deane JJ in that case support the proposition that the powers in s 51(xxxv) and s 51(xxxix) support legislation to establish a tribunal to exercise federal and State powers where this may better achieve the object of preventing and settling interstate disputes in the coal industry[33]. What has been said above respecting the powers and functions of the DPP which derive from State law is consistent with that approach.

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31 *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 291; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 10, 26.

32 (1983) 158 CLR 535.

33 (1983) 158 CLR 535 at 562-563, 566-567, 579-580, 591-592. *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 established that s 75(v) of the Constitution applied to the members of the tribunal, that the powers derived from federal and State law were not required to be exercised in isolation from each other, and that the members were subject to control under s 75(v), even in respect of the exercise or purported exercise of State-sourced powers.

46 *Duncan* is one of a number of decisions[34] which recognise that co-operation on the part of the Commonwealth and States may well achieve objects that could be achieved by neither acting alone. Nothing in these reasons denies that general proposition. The present case emphasises that for the Commonwealth to impose on an officer or instrumentality of the Commonwealth powers coupled with duties adversely to affect the rights of individuals, where no such power is directly conferred on that officer or instrumentality by the Constitution itself, requires a law of the Commonwealth supported by an appropriate head of power.

Conclusion

47 The accused fails in the various challenges he makes in support of his case that the indictment be quashed. Appropriate answers should be given to the questions before the Full Court.

48 The questions and answers should be as follows:

1. Is s 45 of the *Corporations Act* 1989 (Cth) ("the Corporations Act") as amended by s 4(1) of the *Corporations Legislation Amendment Act* 1990 (Cth) a valid exercise of legislative power of the Commonwealth of Australia in so far as, with respect to Western Australia, it purports to require offences to be "taken to be" offences against the "laws of the Commonwealth"?
   Answer: Unnecessary to answer.

2. If yes, against which laws of the Commonwealth are the offences alleged in the indictment committed?
   Answer: Unnecessary to answer.

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34 *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735 at 774 per Starke J; *Wilcox Mofflin Ltd v State of NSW* (1952) 85 CLR 488 at 508-511 per Dixon, McTiernan and Fullagar JJ, 526-528 per Williams J; *R v Lydon; Ex parte Cessnock Collieries Ltd* (1960) 103 CLR 15 at 20; *Airlines of NSW Pty Ltd v New South Wales* (1964) 113 CLR 1 at 40, 42 per Taylor J, 48 per Menzies J, 51-52 per Windeyer J; *Clark King & Co Pty Ltd v Australian Wheat Board* (1978) 140 CLR 120 at 179 per Mason and Jacobs JJ. See, since *Duncan*, *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 at 130.

3. Is s 43(2) of the Corporations Act a valid and effective conferral of function or power upon "an officer or authority" of the Commonwealth to prosecute offences against the Corporations Law of Western Australia?
Answer: Unnecessary to answer.

4. Is s 29 of the *Corporations (Western Australia) Act* 1990 (WA) ("the WA Corporations Act") a valid exercise of the legislative power of the Parliament of Western Australia in so far as it purports to create offences which are "taken to be" offences against the laws of the Commonwealth?
Answer: Section 29 is a valid law of the State of Western Australia and operates according to its terms.

5. If offences by the WA Corporations Act are "taken to be" offences against the laws of the Commonwealth, against which laws of the Commonwealth are the offences alleged in the indictment committed?
Answer: Unnecessary to answer.

6. Are offences which, by the WA Corporations Act, are "taken to be" offences against the laws of the Commonwealth, offences against the laws of the Commonwealth or offences against the laws of Western Australia?
Answer: Given the answer to question 9, unnecessary to answer.

7. Do ss 31 and 33 of the WA Corporations Act constitute a valid and effective conferral of function or power upon "an officer or authority of the Commonwealth" to prosecute offences against the Corporations Law of Western Australia?
Answer: As to s 31, yes, but subject to the answer to question 8. As to s 33, unnecessary to answer.

8. By what legislative authority is the Commonwealth Director of Public Prosecutions empowered to exercise the purported conferral, pursuant to ss 31 and 33 of the WA Corporations Act, of function or power to prosecute offences against the Corporations Law of Western Australia?
Answer: Section 31 of the WA Corporations Act (in combination with s 29(1) of that Act) and s 9(2)(a) of the *Director of Public Prosecutions Act* 1983 (Cth) (in combination with reg 3(1)(d) of the Corporations (Commonwealth Authorities and Officers) Regulations made pursuant to ss 47 and 73 of the Corporations Act).

9. Does the indictment in the matter herein disclose an offence known to the law of:
   (a) the Commonwealth?
   (b) the State of Western Australia?
   (c) the Australian Capital Territory?

   Answer: The indictment discloses offences known to the law of Western Australia.

49 KIRBY J. In *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*[35], Mason J observed:

> "A federal constitution which divides legislative powers between the central legislature and the constituent legislatures necessarily contemplates that there will be joint co-operative legislative action to deal with matters that lie beyond the powers of any single legislature."

50 In these proceedings, Mr Craig Hughes ("the accused") challenges the power of the Director of Public Prosecutions for the Commonwealth ("the Commonwealth DPP") to prosecute him on behalf of the Queen ("the prosecution") in the District Court of Western Australia. He moved to quash the indictment which the Commonwealth DPP had presented against him and another person for three offences under the Corporations Law[36]. The accused contends that, in so far as the Corporations Law is purportedly enacted as a law of Western Australia[37] and in so far as provision is made by Western Australian law authorising the Commonwealth DPP to prosecute him for offences against the Corporations Law, such provisions are invalid as beyond the power of the Western Australian Parliament and contrary to the Constitution. Additionally, the accused contends that, in so far as federal law purports to extend its operation into the criminal law of Western Australia and to authorise the Commonwealth DPP to prosecute him under Western Australian laws, it too is invalid as contrary to the Constitution.

51 The accused's arguments thus present a challenge to the scheme adopted for the regulation of corporations in Australia, of which the Corporations Law is the centrepiece. Unless the offences provided in the Corporations Law are valid and may be the subject of prosecution in Western Australia by the Commonwealth DPP, the legislative and administrative scheme for the regulation of corporations in Australia would collapse. Without enforceability, the Corporations Law would be no more than a pious aspiration. The importance of the accused's challenge to the validity of the indictment could therefore not be overstated.

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35 (1983) 158 CLR 535 at 560 (hereafter "*Duncan*").

36 Against s 1064(1) read with s 1311(1)(a).

37 Pursuant to the *Corporations (Western Australia) Act* 1990 (WA) ("the WA Corporations Act"), s 7. This section re-enacts the Corporations Law as set out in the *Corporations Act* 1989 (Cth) ("the Corporations Act"), s 82 as a State law to be referred to as the "Corporations Law of Western Australia".

52 To answer the questions reserved for the opinion of the Full Court[38], propounded by the accused in support of his contentions, it is necessary to resume the unpleasant task[39] of examining an almost incomprehensible network of federal, State and Territory laws. This and a like task have lately engaged the Court in other challenges bearing some similarities to the present[40]. The Court, in matters such as this, is not involved in the ascertainment of the substantive merits of the prosecution but only its legal merits. If a gap in the legislation is found – either because of the omission to provide a critical power[41] or because of the enactment of crucial provisions beyond constitutional power[42] – this Court must say so, leaving it to legislators and officials to sort out the consequences.

53 The national importance of the legislation under scrutiny, the way in which it attempts to achieve its objectives by cooperation amongst the constituent governments of the Commonwealth and the presumption that such cooperation is an elemental feature of the federal system of government which the Constitution establishes, make it appropriate to approach this matter in a way that gives the Constitution and the legislation in question, to the full extent that their language and structure allow, an operation that is rational, harmonious and efficient[43]. This Court should be the upholder, and not the destroyer, of lawful cooperation between the organs of government in all of the constituent parts into which the Commonwealth of Australia is divided[44]. No other approach is appropriate to the

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38 By order of Gummow J dated 29 November 1999. The questions are set out in the reasons of Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ (hereafter "the joint reasons") at [48].

39 *Byrnes v The Queen* (1999) 73 ALJR 1292 at 1308; 164 ALR 520 at 543 (hereafter "*Byrnes*").

40 In addition to *Byrnes* see *Bond v The Queen* (2000) 74 ALJR 597; 169 ALR 607 (hereafter "*Bond*").

41 Such as the power of the prosecutor to appeal considered in *Byrnes* and *Bond.*

42 As was asserted to be the case in this matter.

43 *Re Wakim; Ex parte McNally* (1999) 73 ALJR 839 at 879; 163 ALR 270 at 325 (hereafter "*Re Wakim*").

44 This was the view expressed in *Re Wakim* (1999) 73 ALJR 839 at 879; 163 ALR 270 at 325.

interpretation of the basic law of the "indissoluble Federal Commonwealth"[45] upon which the people of Australia agreed when the Constitution was adopted and which they are taken to accept for their governance today[46].

Facts, applicable legislation and historical background

54 The relevant facts, the history of the proceedings and the provisions of the legislation in question are all contained in the joint reasons in terms which I accept.

55 It is helpful, in my view, in construing the provisions of the federal and State legislation which the accused challenges to view that legislation in the context of the purposes for which it was enacted. For most of the first century of federation the regulation of corporations in Australia was substantially left to State and Territory law. Because of the paucity of relevant federal courts, jurisdiction over corporations was substantially confined to that of State and Territory courts, save for a relatively small number of cases which found their way to this Court or to the Privy Council. The growth of the national and global economies and of a significant number of corporations operating in several or all of the jurisdictions of Australia (and overseas) eventually produced the first cooperative scheme for corporate regulation. This involved generally identical Companies Codes and an interjurisdictional mechanism designed to develop and maintain uniform administration and legislative amendments[47].

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45 Preamble to the *Commonwealth of Australia Constitution Act* 1900 (Imp) (63 & 64 Vict c 12).

46 *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351 at 441-442; *Breavington v Godleman* (1988) 169 CLR 41 at 123; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 484-486; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138; *McGinty v Western Australia* (1996) 186 CLR 140 at 230.

47 The history is found in *The Broken Hill Pty Co Ltd v National Companies and Securities Commission* (1986) 160 CLR 492 at 505-509. See also Ford, Austin and Ramsay, *Ford's Principles of Corporations Law*, 9th ed (1999) at 45-47; Saunders, "Administrative Law and Relations Between Governments: Australia and Europe Compared", unpublished paper (2000) at 23-25.

56 The inadequacies and inefficiencies of this cooperative arrangement soon became apparent. Meanwhile, a number of decisions of this Court[48], disapproving of and discarding earlier authority[49], attracted fresh attention to the potential of the corporations power under the Constitution[50] to afford a substantial foundation for federal regulation of corporations of the kind described in the Constitution[51].

57 It was the pursuit of this new idea, together with the need for a more efficient system of national regulation of corporations in Australia, that led to the enactment of the Corporations Act. That Act was not proclaimed to commence pending a determination by this Court of questions relating to the validity of a number of its provisions. Those provisions were "based upon the assumption that the Commonwealth has power to legislate for the incorporation of a company if the subscribers to the memorandum of association intend that trading or financial activities are to be a substantial part of its activities"[52]. Furthermore the Corporations Act, as originally enacted, assumed "that the Commonwealth can prohibit the incorporation of a company under the law of a State or Territory if the body upon incorporation will be a trading or financial corporation"[53].

58 In the *Incorporation Case*[54] this Court, by majority[55], held that the corporations power did not entitle the Federal Parliament to legislate for the incorporation of trading and financial corporations. A key assumption of the Corporations Act, as enacted, was thus invalidated. This narrow decision of the Court will, in my opinion, one day need to be revisited[56]. A factual consequence

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48 Especially *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282; *Fencott v Muller* (1983) 152 CLR 570.

49 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

50 Constitution, s 51(xx).

51 Namely, foreign corporations and trading or financial corporations.

52 *New South Wales v The Commonwealth* (*The Incorporation Case*) (1990) 169 CLR 482 at 496.

53 *Incorporation Case* (1990) 169 CLR 482 at 496.

54 (1990) 169 CLR 482.

55 Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ; Deane J dissenting.

56 cf *Byrnes* (1999) 73 ALJR 1292 at 1308; 164 ALR 520 at 543.

has been the grotesque complications that exist in the regulation of corporations under Australian law illustrated in *Byrnes*[57], *Bond*[58] and now this case.

59 The precise reasons for adopting the scheme that now comes under scrutiny, in response to the *Incorporation Case,* are not disclosed. The rejection of a formal amendment of the Constitution to allow ample legislative powers to the Federal Parliament can doubtless be explained by the discouraging history of referendum proposals under s 128 of the Constitution[59]. The disinclination to refer powers to[60], or to request and concur in the exercise of State powers by[61], the Federal Parliament is said to arise out of a concern that such powers, once surrendered, might not be capable of retrieval by the States. But only political considerations, disputes over revenue and possibly a feeling of discouragement following the *Incorporation Case* can explain the nearly incomprehensible scheme of legislation eventually adopted.

60 Courts, including this Court, regularly speak in terms of the "intention" of the legislature when interpreting particular legislation. This polite but unacceptable fiction has never been shown in starker relief than in the present case. So complex is the interlocking legislation, with fiction piled upon fiction, that it must be doubted whether any of those presenting and enacting it were truly aware of precisely what they were doing. It may be hoped that this and other recent decisions, together with the great national importance of the subject matter of the legislation, will encourage its early reconsideration and the adoption of a simpler constitutional foundation to reduce the perils that are otherwise bound to recur, possibly with serious results.

The Heads of Agreement and the purposes of cooperation

61 The decision of this Court in the *Incorporation Case* was announced on 8 February 1990. The original Heads of Agreement were signed in Alice Springs

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57 (1999) 73 ALJR 1292; 164 ALR 520.

58 (2000) 74 ALJR 597; 169 ALR 607.

59 A number of proposals have been made for the amendment of the Constitution to enlarge the powers of the Federal Parliament over trade and commerce and corporations. Such proposals were put and failed to pass in April 1911, May 1913 and December 1919. See Blackshield and Williams, *Australian Constitutional Law and Theory*, 2nd ed (1998) at 1184-1185.

60 Under the Constitution, s 51(xxxvii).

61 Under the Constitution, s 51(xxxviii).

in June 1990[62]. Thereafter the legislation, the subject of these proceedings, was enacted, in turn, by the legislatures of the Commonwealth, the States and the Northern Territory.

62 Put broadly, the purposes were:

1. To provide, in place of the previous laws regulating corporations in Australia, a nation-wide system of corporate regulation that would involve cooperation between the Commonwealth, the States and the Territories through their respective Executive Governments and legislatures;

2. To effect such cooperation in response to the urgent situation presented by the weaknesses of the earlier cooperative scheme[63], by implementing the new national scheme in accordance with a political agreement reached at Alice Springs between the representatives of the Commonwealth, the States and the Northern Territory of Australia; and

3. To enact legislation, as necessary, to give effect to cl 27.1 of the Heads of Agreement[64]. That subclause provides, relevantly:

> "Consistent with the Commonwealth character of the proposed applied State laws –
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> - the ASC[65] and the Commonwealth Director of Public Prosecutions will have responsibility for the prosecution of offences under the new legislation;

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62 Heads of Agreement – *Future Corporation Regulation in Australia*, 29 June 1990. The Heads of Agreement were later amended and endorsed as amended by all participating governments on 23 September 1997. See Corporations Agreement (1997) now in force as between the participating governments of the Commonwealth, the States and the Northern Territory.

63 Illustrated by the collapse in the 1980s of a number of major Australian financial and trading corporations.

64 The Heads of Agreement of June 1990 were tabled in the Senate. See Australia, Senate, *Parliamentary Debates* (Hansard), 11 December 1990 at 5380. The legislative scheme implemented to give effect to the Heads of Agreement is described in cl 502 of the Corporations Agreement which was entered on 23 September 1997 to supplement the national scheme laws.

65 Australian Securities Commission (now Australian Securities and Investments Commission) referred to in the Corporations Agreement, Preamble par 4(a).

(Footnote continues on next page)

- arrangements between the Commonwealth DPP and State counterparts will enable the Commonwealth DPP to prosecute offences under State criminal law where the relevant conduct is associated with prosecution by the DPP of offences under the new legislation or arises out of an ASC investigation".

63 Introducing the amendment to the Corporations Act[66] designed to afford a new constitutional foundation for that Act and to adopt a new methodology for its nation-wide application, the Federal Attorney-General outlined the defects in the previous cooperative scheme[67]. He described the agreement between the governments. He acknowledged the "need to take account of the decision of the High Court in the corporations case [sic], and to avoid any possible future constitutional uncertainties in relation to the new national legislation"[68]. He also declared that the means of achieving all of these objectives was "the adoption of a novel legislative device whose effect will, in summary, be to 'federalise' such offences"[69].

64 It is this "novel legislative device" which the accused attacks in these proceedings. In essence, he asserts that it is beyond the power of the Federal Parliament to "federalise" what are in truth State offences or to authorise an officer of the Commonwealth (the Commonwealth DPP) to prosecute and enforce such illegitimately "federalised" State offences. Furthermore, he contends that it is not competent for the Parliament of a State or a Territory legislature, at least in the way they had acted, in effect to abdicate or surrender

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See *Australian Securities and Investments Commission Act* 1989 (Cth), s 8; cf *Re BPTC Ltd (In Liq)* (1992) 29 NSWLR 713.

66 The Corporations Legislation Amendment Bill 1990 (Cth) which later became the Act of that name amending the Corporations Act.

67 "[T]he lack of a single clearly defined line of ministerial responsibility to a single Parliament for the operation of the scheme. ... [F]ragmented administration, ineffective use of resources and the lack of consistent, coordinated and coherent direction in regulation and enforcement." See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 November 1990 at 3663-3664.

68 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 November 1990 at 3664-3665.

69 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 8 November 1990 at 3665.

legislative power to the Federal Parliament otherwise than as the Constitution envisages[70] or to "federalise" a State (or Territory) offence.

Cooperation in the Australian federation

65 *Approach to the task of interpretation*: The fact that it might have been possible to achieve an efficient system of national regulation of corporations in Australia by other means is irrelevant to the issues presented by these proceedings. From first to last they concern the meaning and validity of the legislation in fact enacted. Likewise, a natural sense of irritation with the apparently unnecessary complexity of that legislation, or a distaste for the "novel legislative device" which it adopts are not proper foundations for the elucidation of the meaning of that legislation and its measurement against the requirements of the Constitution. Certain general propositions can be stated. I do not take them to be disputed.

66 In considering the validity or otherwise of the legislation giving effect to cooperation between the units of the federation (federal, State and Territory) said to be invalid, it is necessary, at the threshold, to elucidate the meaning and operation of the provisions in question[71]. This is an elementary point. However it is important in the present case. If particular provisions claimed to be unconstitutional have no operation in the circumstances of the matter before the Court, it is irrelevant, and therefore unnecessary, to determine their validity. Constitutionality is not normally decided on a hypothesis inapplicable to the resolution of a particular dispute[72]. If, upon a true construction of the legislation, it operates in a way that does no offence to the language and structure of the Constitution[73], it is irrelevant that, had it been construed in a different way, it might have done so. This Court will not answer constitutional questions on the basis of assumptions that have no practical or legal consequence for the case in hand.

67 *Cooperation is a constitutional objective*: Particular provisions of the Constitution must be construed in the context of the fundamental purposes of that document. Relevantly, these include affording a charter for the entire government of the Australian Commonwealth in a nation of continental size, with a relatively small and scattered population for which the necessarily limited

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70 ie pursuant to the Constitution, s 51(xxxvii), s 51(xxxviii) or s 128.

71 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186 per Latham CJ.

72 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266.

73 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; cf *Re Wakim* (1999) 73 ALJR 839 at 877-878; 163 ALR 270 at 323.

resources of government ought, to the extent that the Constitution permits, to operate harmoniously and efficiently to achieve the constitutional objectives of "peace, order, and good government of the Commonwealth"[74].

68 Cooperation between the legislatures and the Executive Governments (and in my view the judiciary) of the constituent parts of the Commonwealth, far from being an idea alien to the Constitution, is a "positive objective"[75] of the polity which the Constitution establishes[76]. The presumption remains that "federalism and cooperation are not inconsistent"[77]. It is true that the Constitution imposes an allocation of powers and functions between the constituent parts of the Commonwealth (on the one hand) and also between the respective branches of government (on the other). But the nature of the Australian federation is such that a high measure of cooperation is contemplated at all levels. Moreover, cooperation is often achieved.

69 Some of the provisions of the Constitution expressly envisage cooperative schemes between the Commonwealth and the States[78]. Past decisions of this Court accept the power of the legislatures of the States and self-governing Territories to cooperate with the Federal Parliament in the enactment of complementary legislation. Not only does this extend at an intergovernmental level to agreement between the polities themselves on matters such as the effective sharing of functions and of revenues[79]. It also extends to empowering

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74 The opening words of s 51 of the Constitution.

75 *Duncan* (1983) 158 CLR 535 at 589.

76 *Duncan* (1983) 158 CLR 535 at 560.

77 *Re Wakim* (1999) 73 ALJR 839 at 846 per Gleeson CJ; 163 ALR 270 at 280.

78 For example, s 51(xxxiii) and (xxxiv) (acquisition and extension of railways in a State with the consent of a State); s 51(xxxvii) (reference of powers); s 51(xxxviii) (exercise of powers on request); s 73(ii) (appellate jurisdiction of the High Court to include appeals from State courts); s 77(iii) (investment of State courts with federal jurisdiction); s 84 (rights of officers of the departments of State public services transferred to the Commonwealth); ss 105 and 105A (cooperative management of public debts of the States); s 111 (surrender of territory by a State); s 119 (protection of a State against domestic violence); s 120 (detention of federal prisoners in State prisons).

79 As provided under the Heads of Agreement (1990) and the Corporations Agreement (1997).

officers and authorities of the Commonwealth, States and Territories to enforce each others' laws and to collect federal, State and Territory revenues[80].

70 So far as the officers of the Executive Governments of the Commonwealth, States and Territories are concerned, it is "beyond question"[81] that the legislative powers of the constituent elements of the Australian federation extend to entry into intergovernmental agreements on matters of joint interest. Where legislation is required to implement such agreements, such legislation will be upheld by this Court "so long … as the end to be achieved and the means by which it is to be achieved are consistent with and do not contravene the Constitution"[82].

71 Any federal Constitution imports a measure of cooperation between the constituent parts. That is the very nature and essence of federation[83]. Cooperation to enhance the movement of people, goods and services within the federation[84] and to diminish impediments to optimal trade in property rights within the federation are legitimate federal objectives[85]. That this is a feature of the Australian federation is made clear by the many provisions which the Constitution contains creating a national common market[86] and establishing uniform tariffs, customs, excise and bounties[87]. For the better achievement of such objectives, it is clear that a high level of cooperation between the constituent parts of the Commonwealth is envisaged. This fact helps to explain why negative implications forbidding such arrangements have not generally been

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80 *Duncan* (1983) 158 CLR 535 at 553 per Gibbs CJ.

81 *Duncan* (1983) 158 CLR 535 at 560 per Mason J.

82 *Duncan* (1983) 158 CLR 535 at 560.

83 Whincop, "Trading Places: Thoughts on Federal and State Jurisdiction in Corporate Law After *Re Wakim*", (1999) 17 *Company and Securities Law Journal* 489 at 493; Ramsay, "Company Law and the Economics of Federalism", (1990) 19 *Federal Law Review* 169; Whincop, "The Political Economy of Corporate Law Reform in Australia", (1999) 27 *Federal Law Review* 77.

84 *Tolofson v Jensen* [1994] 3 SCR 1022 at 1046-1047.

85 Whincop, "Trading Places: Thoughts on Federal and State Jurisdiction in Corporate Law After *Re Wakim*", (1999) 17 *Company and Securities Law Journal* 489 at 490 citing Coase, "The Problem of Social Cost", (1960) 3 *Journal of Law and Economics* 1.

86 See especially the Constitution, s 92.

87 See especially the Constitution, ss 86, 87, 88, 90, 93 and 99.

drawn by this Court[88]. On the contrary, this Court has adopted a general approach which supports such cooperation[89].

72 The fact that such commingling of legislative and administrative powers has been accepted as constitutionally permissible has meant that, in the Australian federation, unlike some others, the constituent parts of the federation can, by cooperation, achieve objects and perform functions which, separately, would have been impossible[90]. The advantages secured are not only the obvious and practical ones. They also extend to "subtle" benefits such as existed under the original cross-vesting legislation[91]. Thus the kind of intergovernmental regulation of the coal industry in Australia that was upheld by decisions of this Court[92] would not have been possible by separate legislation of the Commonwealth and the States concerned. This Court emphasised that what was created by the joint operation of the federal and State legislation in relation to *Re Cram* was not a separate federal and State tribunal meeting for convenience in the one place and made up of common personnel. It was a single joint tribunal exercising at the one time both federal and State powers[93]. This fact permitted the officers and authorities concerned to derive their respective existence from federal and State Acts and to perform functions and exercise powers which, individually or severally, they could not have done.

73 The decisions of this Court upholding the foregoing principles[94] as possible within the federation for which the Constitution provides contained no dissenting opinions. They expressed the unanimous approach of this Court about the ambit and effect of permissible legislative and administrative cooperation in Australia.

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88 An exception is *Re Wakim* in relation to Ch III of the Constitution.

89 *Duncan* (1983) 158 CLR 535 and *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 (hereafter "*Re Cram*").

90 *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735 at 774; *Re Wakim* (1999) 73 ALJR 839 at 846, 864, 880-881; 163 ALR 270 at 280, 304-305, 327.

91 Moloney and McMaster, *Cross-Vesting of Jurisdiction: A Review of the Operation of the National Scheme* (1992), noted in *Re Wakim* (1999) 73 ALJR 839 at 880; 163 ALR 270 at 326.

92 *Duncan* (1983) 158 CLR 535 and *Re Cram* (1987) 163 CLR 117.

93 *Re Cram* (1987) 163 CLR 117.

94 *Duncan* (1983) 158 CLR 535 and *Re Cram* (1987) 163 CLR 117.

The accused did not contest these authorities. In these proceedings, this Court must apply the principles which they establish.

74 *Division of legislative responsibility*: It was also common ground (and correctly so) that neither the Federal Parliament nor a State Parliament or Territory legislature enjoys the power, by its own legislation, to change the substantive character of a law that it enacts so as to make it the law of another Parliament or legislature. The Constitution provides for both the Federal[95] and State Parliaments[96]. It empowers the creation of the legislatures of the Territories[97]. The character of each legislature is fixed by its constitutional origins, purposes and powers. One could not, by its own declaration or assertion, turn itself into another. Nor by any legislative formula could one enact laws amounting to laws of another. The constitutional division of legislative responsibility between the constituent legislatures of Australia confines each to its own legislative concerns. These propositions were the linchpin for the accused's arguments. However, they were not contested by the prosecution nor by those governments intervening to support it.

75 *Authority for conferral of functions and powers*: An officer or authority of the Commonwealth (such as the Commonwealth DPP) would ordinarily be immune from the imposition, by a law of a State or Territory, of functions and powers distinct from, or additional to, those imposed by federal law[98]. Effective immunity from such imposition arises from several sources. These include the provisions of the Constitution itself[99]; the implication derived from the Constitution that the laws of the States and self-governing Territories may not impermissibly restrict or modify the capability of the Commonwealth to perform its functions as such[100]; and the principle of statutory construction that the

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95 Constitution, Ch I.

96 Constitution, s 107.

97 Under the Constitution, s 122.

98 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 426, 452-453, 469-470; cf *Byrnes* (1999) 73 ALJR 1292 at 1308-1309; 164 ALR 520 at 544.

99 Constitution, s 109. See *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 459, 469; *Bond* (2000) 74 ALJR 597 at 600; 169 ALR 607 at 610; cf *The Commonwealth v Cigamatic Pty Ltd (In Liquidation)* (1962) 108 CLR 372 at 378 per Dixon CJ.

100 cf *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 79; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 507-508.

functions of a donee of legislative power will ordinarily be taken as confined to those relevant to the polity within which the officer or authority concerned operates[101].

76 Nevertheless, subject to the Constitution, the Federal Parliament has the power to make it clear that it does not purport to "cover the field" or to exclude the conferral of State or Territory administrative powers on a federal officer or authority; that it consents to the imposition by a State or Territory of additional functions on a federal officer or authority created by or under its laws; and that the addition of such functions are to be treated as compatible with its own legislation.

77 To permit the performance of functions and the exercise of powers by an officer or authority of the Commonwealth additional to those expressly conferred by the Federal Parliament (and to authorise the consequent appropriation of moneys to the Commonwealth for that purpose), specific legislation of the Federal Parliament is required. However, if such legislation is validly enacted, no reason of constitutional principle prevents an officer or authority of the Commonwealth from exercising such additional functions conferred by or under State or Territory law. The question in each case is whether a State or self-governing Territory, by its law, has validly *conferred* the performance of functions and the exercise of powers on the officer or authority of the Commonwealth concerned. If it has, the counterpart question then arises as to whether the Commonwealth has validly *consented* to such conferral of State or Territory functions and powers and has *authorised* them to be performed and exercised to an end and by a means which do not contravene the Constitution[102]. These are the ultimate questions that must be answered in the present proceedings.

78 *Cooperation may be subject to constitutional prohibitions*: No legislative provision to implement a cooperative scheme may contravene a prohibition expressed in, or implied from, the terms or structure of the Constitution. Where it is argued that legislation contravenes an express constitutional prohibition, such as that contained in s 92 of the Constitution, the courts will examine the

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101 *Victoria v The Commonwealth* (*Industrial Relations Act Case*) (1996) 187 CLR 416 at 560-561; *Byrnes* (1999) 73 ALJR 1292 at 1296-1297; 164 ALR 520 at 527 citing *Re Cram* (1987) 163 CLR 117 at 127-128. See also *Duncan* (1983) 158 CLR 535 at 579.

102 *Duncan* (1983) 158 CLR 535 at 560 per Mason J.

substantive operation of the impugned law to test its validity by reference to the prohibition[103].

79 An attempt to circumvent limits imposed by the Constitution on federal, State and Territory laws will also be ineffective[104]. It was on this footing that this Court held that one element of the second cooperative scheme (that providing for the cross-vesting of State jurisdiction in federal courts) was invalid. Over-ruling *Gould v Brown*[105], the Court concluded that the terms and structure of Ch III of the Constitution forbade the legislature of any polity in the federation, other than the Federal Parliament, from conferring jurisdiction on a federal court. The outer boundaries of cooperative legislation were thus set. No amount of legislative cooperation or intergovernmental agreement could supply the power to overcome a constitutional prohibition if one applies[106].

80 The result of the holding in *Re Wakim* was to invalidate an important element of the Heads of Agreement. It rendered invalid, and thus inoperative, those provisions of the Corporations Act and of the State Corporations Acts that purported to vest State judicial power in federal courts. That this was an important component of the second cooperative scheme cannot be doubted. Instead of relying on the general provisions of the *Jurisdiction of Courts (Cross-vesting) Act* 1987 (Cth) and the mirror legislation in each State and the Northern Territory, special provisions for corporations had been included in the respective Corporations Acts[107].

81 For the accused, the present proceedings were to be seen to be as much the progeny of *Re Wakim* as of the decisions in *Byrnes* and *Bond*. No implied constitutional prohibition derived from Ch III was invoked because of the way in

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103 *Cole v Whitfield* (1988) 165 CLR 360 at 401, 408; *Street v Queensland Bar Association* (1989) 168 CLR 461 at 524-525, 569; *Ha v New South Wales* (1997) 189 CLR 465 at 498.

104 *Barton v Commissioner for Motor Transport* (1957) 97 CLR 633; *Re Wakim* (1999) 73 ALJR 839 at 846; 163 ALR 270 at 280.

105 (1998) 193 CLR 346.

106 *Re Wakim* (1999) 73 ALJR 839 at 852; 163 ALR 270 at 288-289.

107 Corporations Act, s 56 and *Corporations [State] Act* 1990, s 42 of each State and in the Northern Territory. The national scheme was in force by 1991. See Ford, Austin and Ramsay, *Ford's Principles of Corporations Law*, 9th ed (1999) at 49-50.

which the proceedings had come before this Court[108]. Such a prohibition may later arise in respect of attempts to invoke the jurisdiction of federal courts in relation to the conduct of the Commonwealth DPP in the discharge of purely State functions and powers[109]. Instead, the implied prohibitions invoked by the accused in these proceedings were: (1) that no legislature within the federation could usurp or purport to exercise the powers of another legislature; (2) that no such legislature could abdicate its legislative functions to another save as the Constitution expressly permits[110]; and (3) that no such legislature could enact a "law" which was so unacceptably vague and uncertain as to be denied the character of valid law as the Constitution envisages it.

Confining the issues: interpretation of the legislation

82 Many of the questions reserved for the opinion of the Full Court do not arise, either because of the undisputed factual circumstances of the proceedings involving the accused, or because of the true construction of the Corporations Act or the WA Corporations Act.

83 Thus, it is unnecessary to answer the first of the questions reserved which refers to s 45 of the Corporations Act as amended[111]. This is because, in its terms, s 45 applies only in the Australian Capital Territory[112]. It has no application to the present case which must be determined by reference to the law applicable in Western Australia. The first question is therefore unnecessary to answer. The second question, which is dependent on it, must likewise be so answered.

84 Similarly, it is unnecessary to answer the third question which concerns s 43(2) of the Corporations Act. That sub-section does not arise because its operation is limited, in its terms, to laws of the Commonwealth "as applying because of" sub-section (1) or (2) of s 42 of the Corporations Act. These sub-sections, in turn, provide for federal laws to apply as laws of the Australian Capital Territory or external Territories respectively. The provision of s 43(2) therefore has no application to a case such as the present which concerns the exercise of powers by the Commonwealth DPP only within Western Australia.

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108 By removal of the matter into this Court pursuant to the *Judiciary Act* 1903 (Cth), s 40.

109 eg under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

110 Constitution, s 51(xxxvii) and (xxxviii).

111 By the *Corporations Legislation Amendment Act* 1990 (Cth).

112 *Byrnes* (1999) 73 ALJR 1292 at 1305; 164 ALR 520 at 539-540.

85 The fourth question presents an exercise in construction of the inter-related legislation. The accused asserts that the Commonwealth DPP lacks the power to prosecute him on the basis that the Corporations Act and the WA Corporations Act purport to convert offences against the Corporations Law of Western Australia into federal offences and this is beyond the power of the Parliament of Western Australia. The accused's argument proceeds that the offences are not independently supported by any head of federal legislative power and that, consequently, the purported conferral of power upon the Commonwealth DPP to prosecute him for the offences alleged is ineffective. It is thus unlawful. It requires the quashing of the indictment.

86 There is a fundamental flaw in the first step of this argument. It arises out of a misinterpretation of the meaning and effect of the inter-related provisions of the Corporations Act and the WA Corporations Act. It is a misinterpretation that is easily made having regard to the extremely opaque terms in which the "novel legislative device" is expressed. But it illustrates the importance, in constitutional elucidation, of first construing the law which is impugned.

87 The WA Corporations Act, s 29, read in the context of the cooperative legislative scheme, does not purport, in fact or law, to enact a law of the Commonwealth. Instead, out of the legislative powers of the Parliament of Western Australia, it applies certain "Commonwealth laws" in Western Australia. It does so, as twice indicated, by the use of statutory fictions. The first fiction is evident in the statement that such "Commonwealth laws" apply "*as* laws of Western Australia". The second is that such laws apply "*as if* those provisions were laws of the Commonwealth and were not laws of Western Australia"[**113**].

88 Whilst it would certainly be impermissible for the Parliament of Western Australia to purport to exercise the legislative powers of the Federal Parliament, it is not impermissible, in the present context, for that State Parliament to apply designated federal laws "as laws of Western Australia". The distinction is important. If the Parliament of Western Australia purported to enact a law with a legal operation as a "Commonwealth law", that would indeed exceed the limitations (substantially geographic) upon its legislative powers. But this would not be the case where, sourced to its legislative powers in Western Australia, the Parliament of that State adopts and applies, as a law of the State, a pre-existing law of the Commonwealth (or of some other State or Territory) which it thereby makes its own. The reading of the closing words of s 29(1) of the WA Corporations Act must be confined to giving effect to the foregoing purpose. It is for the purpose of the laws of Western Australia, and to the extent that the Parliament of Western Australia can so enact, that the adopted federal laws are to be treated "*as if* those provisions were laws of the Commonwealth and were not

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113 WA Corporations Act, s 29 (emphasis added).

laws of Western Australia". This fiction does not change the constitutional character of those laws. That character is settled both by the body giving legal effect to the laws and by the language in which they are expressed. The character of the law remains that of a law of the State of Western Australia whose Parliament has enacted it.

89 So far as s 29(2) of the WA Corporations Act is concerned, the foregoing construction is reinforced by the opening words of the sub-section ("For the purposes of a law of Western Australia ..."). This sub-section is an interpretive provision designed to carry into effect the administrative and organisational arrangements agreed to in the Heads of Agreement for the prosecution of offences against the WA Corporations Act. Such prosecution is not to be performed by the agency which would ordinarily have the responsibility of performing the prosecution of State criminal law (ie State prosecutors) but by the agency to which that task is assigned under the Heads of Agreement and by the integrated legislation, namely the Commonwealth DPP.

90 I accept that the obscure and ungainly language of s 29 could reasonably give rise to the objection which the accused argued. But the objection must fail because of the proper interpretation of the applicable provisions. I acknowledge that the terms of s 29 of the applicable local Corporations Act (and its equivalents in other States and the Northern Territory) will give rise to many further problems in working out which laws of the State and of the Commonwealth are picked up and applied, and which are not, in a trial of an offence against the Corporations Law. Thus it was submitted during argument that relevant provisions of the *Crimes Act* 1914 (Cth)[114] relating to the sentencing of federal offenders would apply in such a case. However, there was uncertainty as to whether the provisions of s 80 of the Constitution[115] and the provisions of the *Evidence Act* 1995 (Cth) would apply.

91 These are very practical complications which will doubtless return to trouble the courts unless a greater measure of clarity can be introduced into the operation of the "novel legislative device". But in so far as the accused attacked s 29 of the WA Corporations Act as a purported attempt of the

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114 Part 1B – "Sentencing, imprisonment and release of federal offenders".

115 Requiring that a jury trial be held in the case of certain federal prosecutions. Such a jury trial must conform to constitutional requirements: *Cheatle v The Queen* (1993) 177 CLR 541. It has been held that the Constitution is not itself a "law of the Commonwealth": *Sankey v Whitlam* (1978) 142 CLR 1 at 72-73, 104-105; *Re Colina; Ex parte Torney* (1999) 73 ALJR 1576 at 1592; 166 ALR 545 at 568; cf Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 809.

Western Australian Parliament to go beyond its legislative competence and, in doing so, to create what were *in law* offences against federal law, such submissions fail because they are based on a fundamental misunderstanding about the character of the law. Imperfect as its language may be, it is no more than a legislative provision of the Parliament of Western Australia within that Parliament's own area of legislative competence. This construction is further reinforced by the terms of s 33 of the WA Corporations Act[116]. Construed in the foregoing way, s 29 of the WA Corporations Act is a valid law of the Parliament of Western Australia. It operates according to its terms. The fourth question should be answered accordingly.

92 The fifth question, in so far as it assumes that the offences are in fact "against the laws of the Commonwealth", is likewise based on a false assumption. It is therefore unnecessary to answer it. Similarly, it is unnecessary to answer the sixth question, although it follows from what I have said that the offences provided by s 1064 of the Corporations Law of Western Australia are, and remain, for their legal character, offences against the laws of Western Australia even if, for particular purposes, the fiction in s 29 is brought into play.

93 These conclusions leave to be answered the critical questions reserved to the Full Court concerning: (1) the purported conferral by s 31 (read with s 29) of the WA Corporations Act upon the Commonwealth DPP of functions and powers to prosecute offences against the State law; and (2) the concomitant provision of the Corporations Act, s 47, and reg 3(1)(d) of the Corporations (Commonwealth Authorities and Officers) Regulations (Cth) ("the Regulations") authorising the Commonwealth DPP to accept and perform those functions and exercise those powers. I turn to those questions.

The validity of the State conferral of power

94 *No constitutional abdication*: The accused's contention that the true character of the impugned provisions of the WA Corporations Act was that of an impermissible abdication of State legislative power, contrary to the hypothesis of the Constitution and the requirements of the State Constitution, must be rejected. The argument is similar to that which was advanced unsuccessfully in

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116 The WA Corporations Act, s 33 provides: "Where, by reason of this Division, a function or power is conferred on an officer or authority of the Commonwealth, that function or power may not be performed or exercised by an officer or authority of the State."

Gould[117] and in *Byrnes*[118]. For the reasons which I gave in *Gould*[119], the submission fails here. In *Gould* I said[120]:

> "Care must be observed in the application of these rules [as to renunciation or abdication of legislative responsibility] to co-operative legislative schemes within Australia whereby the several legislatures of the nation, in pursuit of the desirable objective of uniform laws, agree to adopt a common standard and to co-operate in its modification and improvement from time to time. This is not a relinquishment of legislative responsibilities. It is the exercise of them. It is not the creation by one legislature of a new and different legislative authority (which would be forbidden). It is the decision of that legislature to exercise its own powers in a particular way".

Those words apply to the present case. There is no fresh merit in this argument.

95 *No unacceptable vagueness*: In the United States of America, the constitutional guarantee of due process of law[121] has been developed to afford protection from arbitrary government and an assurance of the legitimacy of official conduct. These concepts have been expanded to impose minimum requirements of certainty in relation to the making and expression of laws affecting the liberty and property of individuals[122]. If laws are found to be unacceptably vague or over-broad and uncertain in their commands they are deprived of legal efficacy[123]. There are similar developments of legal reasoning

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117 (1998) 193 CLR 346 at 485-487.

118 (1999) 73 ALJR 1292 at 1294; 164 ALR 520 at 523-524; see also *Cobb & Co Ltd v Kropp* [1967] 1 AC 141 at 156-157; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 263-265.

119 (1998) 193 CLR 346 at 485-487.

120 (1998) 193 CLR 346 at 486.

121 United States Constitution, Fifth Amendment. See also Fourteenth Amendment with its constraint on the States.

122 *Grannis v Ordean* 234 US 385 at 394 (1914).

123 *Giaccio v Pennsylvania* 382 US 399 at 402-403 (1966); *Tuilaepa v California* 512 US 967 (1994); *National Endowment for Arts v Finley* 524 US 569 (1998); *Chicago v Morales* 144 L Ed 2d 67 (1999).

in the Supreme Court of Canada[124], in the European Court of Justice[125] and in the European Court of Human Rights[126].

96 The accused certainly had grounds for criticising the meaning and operation of s 29 of the WA Corporations Act. Precisely which federal laws that section picks up and applies "as laws of Western Australia" is, as I have indicated, most unclear. Similar problems in some ways have long existed in the application of provisions of the *Judiciary Act*[127]. The latter have not hitherto been treated as invalid.

97 The Constitution has no express equivalent to the "due process" requirements of the United States Constitution or the similar obligations on the basis of which the courts in Canada and Europe have developed doctrines of invalidating vagueness. On the other hand, the requirement of due process lies deep in our law, being derived ultimately from the *Magna Charta* which spoke of the King's duty to conform to the "law of the land". Suggestions have been made in this Court that, at least in some circumstances, a constitutional implication of "due process" may be derived from the terms, structure and purposes of the Constitution, and particularly the provisions in Ch III[128]. I am sympathetic to such suggestions.

98 This is not the occasion to explore such suggestions further. Assuming such a principle exists in Australian law, in these proceedings, the particular difficulties that may arise in the implementation of s 29 of the WA Corporations Act do not, in my view, present such an impermissibly vague burden on the persons subject to the section as to invoke a constitutional prohibition invalidating it. The ascertainment of the specific "Commonwealth laws" rendered applicable as laws of Western Australia by force of s 29 of the WA Corporations Act will be an obligation of the courts on a case by case basis. At least that will be so unless the "novel legislative device", of which s 29 is part, is

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124 *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606, referring to s 1 of the Canadian Charter of Rights and Freedoms ("prescribed by law").

125 The Court's doctrine of "legal certainty" has been argued to strike down retroactive penal laws: *Regina v Kirk* [1984] 3 ECR 2689 at 2711.

126 *Valenzuela Contreras v Spain* (1998) 28 EHRR 483 at 497 citing Art 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("in accordance with the law").

127 ss 79, 80 and 80A.

128 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 484-492, 501-503; cf *Dietrich v The Queen* (1992) 177 CLR 292.

replaced by clearer legislative commands. One might reasonably hope for such a development. It may not be constitutionally invalid for the cooperative legislative scheme to proceed in the way that s 29 of the WA Corporations Act does. The section nonetheless imposes a most unreasonable burden on accused persons, prosecutors, trial judges and appellate courts. In the field of corporations law, and particularly where criminal process and sanctions are invoked, such a burden diminishes the efficacy of corporate regulation. It opens the way to technical objections and litigation which add significantly to the costs of administering the regulatory scheme without any equivalent return in terms of proper corporate standards or the achievement of efficient corporate regulation.

99 The foregoing point was made most clearly during the hearing when the Commonwealth candidly admitted that it was unable to say with certainty whether particular federal laws were, or were not, picked up by force of s 29 "in relation to an offence against the applicable provisions of Western Australia"[129]. One thing is clear. The power to prosecute and thus to find and present an indictment is conferred on the Commonwealth DPP expressly by the WA Corporations Act. Other functions and powers are not so clear. Whether or not they are "picked up" by s 29 are questions that lie in wait for a subsequent stage of these or similar proceedings.

100 *A valid Western Australian law*: Subject to the Constitution, it is competent for the Parliament of Western Australia to make laws for the "peace, order and good Government" of that State[130]. In relation to criminal offences, the Parliament of Western Australia has authority to determine the constituent elements of, and the practice and procedure applicable to, crimes that are committed within or in connection with its territorial limits[131]. Provided the legislation has a sufficient territorial connection with Western Australia, it will be valid on that ground[132]. The grant of legislative power includes the power to provide that laws of another jurisdiction, including laws of the Commonwealth, apply in respect of offences against the law of Western Australia as if they were laws of Western Australia. All that this device does is to avoid the necessity of

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129 Such as the application to the trial of such an offender of the *Evidence Act* 1995 (Cth) and the Constitution, s 80 concerning the incidents of jury trial; cf *R v Cook; Ex parte Director of Public Prosecutions (Cth)* [1996] 2 Qd R 283.

130 *Constitution Act* 1889 (WA), s 2(1).

131 *Williamson v Ah On* (1926) 39 CLR 95 at 102, 111; *Lipohar v The Queen* (1999) 74 ALJR 282; 168 ALR 8.

132 *The Commonwealth v Queensland* (1975) 134 CLR 298 at 310-312; *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10-14; *Gould v Brown* (1998) 193 CLR 346 at 376-377.

setting out *seriatim* in the text of the Western Australian law the provisions of the law of the Commonwealth[133]. In relation to conduct constituting an offence against the Corporations Law of Western Australia in or from Western Australia, ss 29(1) and 31(1) are clearly laws which perform that function.

101 There are two relevant impediments to the effective conferral by State legislation of non-judicial functions and powers on an officer or authority of the Commonwealth. The first originates in the implied constitutional immunity which would forbid the States (or self-governing Territories) from imposing functions and powers on such an officer or authority (except by reason of a law applicable to persons generally[134]) in a way that would prevent the latter from discharging the functions and duties of federal office. In an appropriate case this immunity might be waived. Secondly, it is not competent to a State (or self-governing Territory) to impose functions and powers on an officer or authority of the Commonwealth which are inconsistent with the functions and powers imposed by federal legislation[135]. Any imposition of functions and powers would divert the federal officer or authority from the discharge of federal responsibilities, and ordinarily involve expenditure of funds and diversion of personnel, thus rendering the State or Territory law inconsistent with federal law unless expressly authorised by the latter. Hence the need, examined in *Gould*[136] and *Re Wakim*[137], for a coincidence of valid State *conferral* of State functions and powers and valid federal *authorisation* of such conferral on the federal recipient concerned.

102 Once it is accepted that s 29 of the WA Corporations Act is not an abdication of State legislative power but the exercise of it and is not fundamentally flawed as impermissibly vague and uncertain, the effectiveness of the provisions in the WA Corporations Act to impose prosecutorial functions and powers on the Commonwealth DPP is secured by two principal steps. The first is the importation into the law of Western Australia of "Commonwealth laws … in relation to an offence against the applicable provisions of Western Australia"[138].

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133 *Bennion on Statute Law*, 3rd ed (1990) at 274-275.

134 *The Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254 at 262-266; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 427.

135 Constitution, s 109.

136 (1998) 193 CLR 346 at 372, 385, 482, 489.

137 (1999) 73 ALJR 839 at 880-881; 163 ALR 270 at 327.

138 WA Corporations Act, s 29(1).

Relevantly, the "applicable provision" is the Corporations Law and Regulations of that jurisdiction[139]. In this way, the relevant "Commonwealth law", being the *Director of Public Prosecutions Act* 1983 (Cth) ("the DPP Act"), is, in relation to an offence against the Corporations Law of Western Australia, applied by force of the law of Western Australia as a law of that State. It is to be so applied "as if" its provisions were "laws of the Commonwealth and were not laws of Western Australia". But this is only so by force of Western Australian legislation which cannot, of itself, confer upon its own laws all of the characteristics which a federal law, operating by its own force and in its own terms, would (if valid) attract by virtue of the Constitution.

103 Relevantly to these proceedings, the purpose of s 29(1) of the WA Corporations Act is to ensure that the Commonwealth DPP will perform in Western Australia the functions of "investigation and prosecution of offences" against the Corporations Law of Western Australia[140]. The DPP Act, as imported, is to be adapted so that, where otherwise its terms would suggest that the Commonwealth DPP is limited to the prosecution of federal offences, when operating in Western Australia, pursuant to the authority conferred by ss 29 and 31 of the WA Corporations Act, the offences against the applicable provisions of Western Australia are taken, for this limited purpose, to be offences against the laws of the Commonwealth.

104 This interpretation is confirmed by several exclusionary provisions which follow in the WA Corporations Act. First, s 29(2)(b) of the WA Corporations Act provides that where the "Commonwealth law" (here the DPP Act) is picked up and applied as a law of Western Australia, an offence against the applicable provisions of Western Australia is taken not to be an offence against the laws of Western Australia. This is so provided lest, for that reason, it would render inapplicable, in its terms, the DPP Act as applied in Western Australia.

105 The second step is found in the provision of s 31(1) of the WA Corporations Act which is crucial. This sub-section makes it clear that the conferral of functions and powers on an officer or authority of the Commonwealth by a "Commonwealth law applying because of section 29" also confers the same functions and powers in relation to an offence against the corresponding applicable provision of Western Australia. By s 33 of the WA Corporations Act the performance or exercise of such functions and powers by an officer or authority of the State is excluded.

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139 WA Corporations Act, s 3(1).

140 WA Corporations Act, s 28(2)(a).

106 I see no defect in the conferral of State functions and powers in this way upon the Commonwealth DPP. True, the legislative scheme is cumbersome, indirect and needlessly obscure. But, subject to what follows, it is constitutionally valid and effective. By Western Australian law, it authorises the Commonwealth DPP to investigate and prosecute offences against the Corporations Law of Western Australia. These include the offences of which the accused is charged.

The validity of the federal authorisation of such conferral

107 *Federal law authorises State conferral*: By s 47 of the Corporations Act, the Federal Parliament has enacted that Regulations may provide that prescribed officers and authorities of the Commonwealth "have prescribed functions and powers that are expressed to be conferred on them by or under corresponding laws"[141]. The WA Corporations Act is a "corresponding law" for this purpose[142]. By reg 3(1)(d) of the Regulations, made pursuant to s 47 of the Corporations Act, it is expressly provided that the Commonwealth DPP has functions and powers "expressed to be conferred on [it] by or under a corresponding law".

108 The foregoing provisions meet a number of potential objections to the conferral of State functions and powers on the Commonwealth DPP. They constitute a waiver of any constitutional immunity which such an officer or authority of the Commonwealth would enjoy from the unilateral imposition of State functions and powers which are special and particular, rather than applicable to persons generally. They remove any suggestion that the imposition of such State functions and powers is inconsistent with the functions and powers imposed on the Commonwealth DPP by federal law (which would otherwise expel a purported attempt to impose additional and different State functions and powers)[143]. They also explicitly provide the consent of the Federal Parliament which is regarded as necessary for the implementation of such a scheme of interjurisdictional cooperation, given that the operation of the State law would inevitably impose a burden on the consolidated revenue of the Commonwealth.

109 In this case there is no express or implied prohibition in the Constitution against the conferral of such functions and powers by State law on the Commonwealth officer or authority concerned, as was held in *Re Wakim* to exist

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141 See DPP Act, s 6(2)(a) which provides that the functions of the Director include "functions that are conferred on the Director by or under any other law of the Commonwealth".

142 See Corporations Act, s 38 definition of "corresponding law" par (a).

143 By virtue of the Constitution, s 109.

in respect of the purported federal consent to the conferral of State jurisdiction upon federal courts[144]. On the contrary, it is established beyond argument that State functions and powers may be conferred upon officers and authorities of the Executive Government of the Commonwealth[145]. There are many such arrangements to which the Federal Parliament has consented[146].

110 *The federal authorisation is valid in this case*: Where a provision is enacted affording the consent of the Federal Parliament to the conferral of State functions and powers upon an officer or authority of the Commonwealth it must be possible, as with every federal law, to demonstrate constitutional validity of the provision. At least this is necessary where such law is challenged. Here, the accused does challenge the validity of the federal law authorising the Commonwealth DPP to prosecute him for offences provided in Western Australian law. Accordingly, it is not sufficient for the prosecution, or the Commonwealth and States as interveners, simply to point to the cooperative legislative scheme and suggest that this alone and the merits of such national cooperation, without more, sustain the constitutional validity of the facility afforded to the Commonwealth DPP by s 47 of the Corporations Act and reg 3(1)(d) of the Regulations. The Commonwealth DPP for the prosecution must be able to demonstrate that the federal law which, in effect, consents to the conferral on him of State functions and powers is "clothed in the raiments of constitutional validity"[147].

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144 *Re Wakim* (1999) 73 ALJR 839; 163 ALR 270.

145 *Duncan* (1983) 158 CLR 535 at 552-553, 579-580; *Re Cram* (1987) 163 CLR 117 at 148.

146 See eg *Aboriginal and Torres Strait Islander Commission Act* 1989 (Cth), s 9; *Air Navigation Act* 1920 (Cth), s 30; *Australian Federal Police Act* 1979 (Cth), s 8(1)(bc); *Australian National Railways Commission Act* 1983 (Cth), s 11; *Australian National Training Authority Act* 1992 (Cth), s 6; *Australian Prudential Regulation Authority Act* 1998 (Cth), s 9A; *Australian Sports Drug Agency Act* 1990 (Cth), s 9A; *Child Support (Assessment) Act* 1989 (Cth), s 15; *Civil Aviation Act* 1988 (Cth), s 9; *Classification (Publications, Films and Computer Games) Act* 1995 (Cth), s 4; *Gas Pipelines Access (Commonwealth) Act* 1998 (Cth), s 13; *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), ss 11(1)(c), 16; *National Crime Authority Act* 1984 (Cth), s 11; *National Road Transport Commission Act* 1991 (Cth), s 8(1)(d); *Public Service Act* 1999 (Cth), s 71; *Taxation Administration Act* 1953 (Cth), s 13L; *Therapeutic Goods Act* 1989 (Cth), s 6A; *Trade Practices Act* 1974 (Cth), ss 44ZZM, 150F; *Workplace Relations Act* 1996 (Cth), s 5(6).

147 *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 422.

111 On its face, the Corporations Act, as it was amended following the decision in the *Incorporation Case*, rests for its constitutional validity on the legislative power conferred on the Federal Parliament to make laws for the Territories of the Commonwealth[148] together with the express incidental power[149]. The Corporations Act as it was first enacted relied upon a range of heads of federal constitutional powers (notably the corporations power in s 51(xx) of the Constitution). However, such express reliance was withdrawn when the "novel legislative device" was adopted of providing a federal "template"[150] for the Australian Capital Territory, which could be picked up and applied as local law in every State of Australia and in the Northern Territory.

112 Whilst the holding in the *Incorporation Case*[151] stands, it would be impossible to justify a federal law (such as s 47 of the Corporations Act and reg 3(1)(d) of the Regulations) as valid in relation to the State of Western Australia based on no more than the operation of the Corporations Act in the Australian Capital Territory and matters incidental thereto[152]. The absence of express reference in the Corporations Act to other relevant heads of federal legislative power is not fatal to its constitutional validity beyond the Capital Territory. What is in issue is the *existence* of constitutional authority for the impugned law as it operates in the particular case. It is not whether, as a matter of drafting of that law, the relevant federal head of power is that expressly *nominated*[153]. The prosecution and the Commonwealth pointed to various additional sources of power which, they suggested, supported the law authorising the Commonwealth DPP in this case to perform the functions and exercise the powers conferred on it by the law of Western Australia.

113 Amongst the sources of power mentioned were (1) the express incidental power, in aid of the execution of the Executive power of the Commonwealth[154]; (2) the powers supporting the establishment of the office of the Commonwealth

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148 Constitution, s 122.

149 Constitution, s 51(xxxix).

150 Saunders, "Administrative Law and Relations Between Governments: Australia and Europe Compared", unpublished paper (2000) at 23-25.

151 (1990) 169 CLR 482 at 497.

152 cf Saunders, "In the Shadow of *Re Wakim*", (1999) 17 *Company and Securities Law Journal* 507 at 513.

153 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 135.

154 cf *Davis v The Commonwealth* (1988) 166 CLR 79 at 113.

DPP and the express incidental power enlarging those functions in the context of a national cooperative scheme[155]; (3) the implied legislative power to make provision for the acceptance of a State function and the power to give effect to such a scheme; (4) the corporations power[156]; (5) the powers in relation to trade and commerce with other countries and amongst the States and external affairs[157]; and (6) the implied nationhood power, being that which facilitates national cooperation and coordination of governmental activities in response to the "complexity ... of a modern national society"[158].

114 It is possible that some of these sources of federal legislative power would validate different aspects of the federal law in question as applicable to a particular case. Such law might (to the extent that its terms exceeded any available heads of constitutional power) then be capable of being read down, as necessary, to limit its operations to the contexts for which constitutional power existed[159].

115 The validity of the federal law in question in this matter[160] should be explored no further than is strictly necessary to establish validity in this case. The path of wisdom in such a large enterprise is to do only what is essential to answer the questions reserved. Because the context of the accused's case is one which undoubtedly involves activity that constitutes trade and commerce with other countries[161] and affairs external to Australia[162], the federal laws authorising the conferral on the Commonwealth DPP of functions and powers under the WA Corporations Act are valid in so far as they affect the accused. They sustain

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155 cf *Duncan* (1983) 158 CLR 535 at 553, 562, 591.

156 Constitution, s 51(xx).

157 Constitution, s 51(i) (trade and commerce) and s 51(xxix) (external affairs).

158 *Victoria v The Commonwealth and Hayden* (1975) 134 CLR 338 at 412, see also 397-398; *State Chamber of Commerce and Industry v The Commonwealth* (*The Second Fringe Benefits Tax Case*) (1987) 163 CLR 329 at 357; *Davis v The Commonwealth* (1988) 166 CLR 79 at 93; *Re Wakim* (1999) 73 ALJR 839 at 886-887; 163 ALR 270 at 335-337.

159 *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 347-348 per Dawson J; *Industrial Relations Act Case* (1996) 187 CLR 416 at 501-503; *Acts Interpretation Act* 1901 (Cth), s 15A.

160 Corporations Act, s 47 and reg 3(1)(d) of the Regulations.

161 Constitution, s 51(i).

162 Constitution, s 51(xxix).

the performance by the Commonwealth DPP of the function of prosecuting the accused. It is undesirable to go further than this and to consider other hypothetical cases with different facts.

116 The accused submitted that s 47 of the Corporations Act and reg 3(1)(d) of the Regulations, read with s 1064 of the Corporations Law of Western Australia, could not be supported by reference to the trade and commerce power or the external affairs power since such provisions were not directed, in terms, to such activities. He urged that, in considering the constitutional validity of the federal law, authorising the conferral of power on the Commonwealth DPP to prosecute an offence against the WA Corporations Act, it was necessary to look at the statute itself so as to characterise the law in question rather than to evaluate its operation in the facts of a particular case. This is true up to a point.

117 However, it has long been recognised by this Court, in performing the task of characterisation of an impugned law (to discover whether or not it is within the ambit of a propounded head of constitutional power), that the "actual operation of the law in question in creating, changing, regulating or abolishing rights, duties, powers or privileges" is initially to be considered[163]. Once this is done the Court will examine whether the operation of the impugned law "falls in substance within the relevant authorized subject matter, or whether it touches it only incidentally, or whether it is really an endeavour, by purporting to use one power, to make a law upon a subject which is beyond power"[164]. Thus, ascertaining the actual operation of the law in the facts of the particular case is not an exceptional approach. It is normally the first step before the scope of the Federal Parliament's constitutional authority is addressed. This is done by reference to the law's substance rather than its form. The Court then passes to the "text of the law"[165]. Thus the Court "looks to the practical operation (or substance) as well as the legal operation (or form) of an impugned law"[166].

118 In the present matter, the "actual operation of the law in question" undoubtedly affects rights, duties, powers and privileges in relation to activities

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163 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 187 per Latham CJ; see also *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7 per Kitto J.

164 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 187 per Latham CJ.

165 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 426.

166 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 426; see also *Ha v New South Wales* (1997) 189 CLR 465 at 498.

falling within established heads of federal constitutional power, namely s 51(i) and (xxix). Although the text of the law is silent about these propounded paragraphs of the Constitution, the law is as valid as it would have been if they had been expressly mentioned in the text and called in aid of the claim to constitutional validity. The absence of an explicit reference to the constitutional source is certainly unusual[167]. It invites challenges such as the present. However, upon analysis, it is not fatal in this particular instance.

119 Obviously, to the extent that federal law purports to authorise an officer or authority of the Commonwealth to perform functions conferred by State law which seriously affect the liberty and property rights of individuals, it may be expected that, when challenged, those who propound the constitutional validity of such authorisation will be able to demonstrate that validity exists[168]. The more drastic the consequences for those affected, the more vigilant will be the scrutiny of the impugned law, measured against the constitutional warrant. The proposition that serious and burdensome consequences of criminal proceedings may be sustained by reference to nothing more than the creation of the office of the Commonwealth DPP and incidents thereto in the context of the joint cooperative scheme (or this with the execution of the Executive power of the Commonwealth or the implied nationhood power) is highly doubtful. For such outcomes a firm foundation of constitutional authority would appear to be necessary. Under our Constitution, criminal liability and punishment, when provided in a federal law, must be supported by demonstrable constitutional authority. Convenience and desirability are not enough if the constitutional foundation is missing.

120 In the peculiar circumstances of this case that foundation exists. It might also exist in some other circumstances where the practical operation of the law (substance), as well as the legal operation (form), are held to fall within an established head of federal legislative power. Obviously, the search for a constitutional source is not helped by the absence of any relevant expression by the Federal Parliament of the propounded constitutional bases of its enactment. It remains to be seen whether, in other factual circumstances, such defects will prove fatal to other prosecutions. Clearly, it is a fragile foundation for a highly important national law. The present accused fails in his challenge. But the next case may not present circumstances sufficient to attract the essential constitutional support. Early attention to the "novel legislative device" would appear to be prudent.

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167 For a provision at the opposite extreme see *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 at 199, noted in *Grain Pool of WA v The Commonwealth* (2000) 170 ALR 111 at 114.

168 *Davis v The Commonwealth* (1988) 166 CLR 79 at 102, 113.

Matters not for decision

121 The foregoing conclusions leave many questions raised during argument unanswered. For example, it is not necessary to decide whether the Commonwealth DPP, when solely exercising State functions and powers, is an officer of the Commonwealth for the purposes of the Constitution[169]. The basis upon which the present matter comes before this Court obviates any necessity to decide that point. It should therefore be left to a proceeding where that decision is essential.

122 It is also unnecessary to speculate on whether any heads of power other than those in s 51(i) and (xxix) of the Constitution would sustain the federal law authorising the performance by the Commonwealth DPP of functions conferred by State law, had the element of commerce with another country, external to Australia, not been present in the particular facts of this case to which the law applied.

123 Nor, in my view, should this Court deal with a point raised by the accused during argument concerning the alleged defects of the indictment presented in his case by reason of the form in which the name of the prosecutor was expressed[170]. This Court, as now constituted, is not concerned with the application to quash the indictment for defects of form. Its sole concern is to answer questions of large moment and general application that have been reserved to it. None of those questions raises an objection as to the form of the indictment. It is unthinkable that this Court would usurp the functions of the courts of Western Australia by deciding such a point.

124 Finally, in my view, it is not necessary in these proceedings to decide whether the Corporations Act not merely *authorises* the Commonwealth DPP to perform functions and exercise powers under State law but, by force of federal law, *imposes* a duty or obligation to do so. The verb in the federal laws in question (s 47 of the Corporations Act and reg 3(1)(d) of the Regulations) is expressed to provide that the prescribed authority (the Commonwealth DPP) shall "*have* prescribed functions and powers" (emphasis added). In its terms this expression appears to be a recognition of the fact that the binding obligation imposed by such functions and powers derives from State (or Territory) law and not from the federal law in question. Upon this basis the federal law is merely

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169 Constitution, s 75(v); cf *Re Cram* (1987) 163 CLR 117 at 131; Saunders, "Administrative Law and Relations Between Governments: Australia and Europe Compared", unpublished paper (2000) at 25.

170 Transcript of proceedings, High Court of Australia, 1 March 2000 at 7-14.

facultative and permissory[171]. At least that would appear to be all that the Federal Parliament has enacted.

125 Commonly, by virtue of their character, the imposition of public functions on a statutory officer or authority such as the Commonwealth DPP will oblige the performance of those functions to the full extent of the office-holder's capacity[172]. In the present case, the discharge of the functions under Western Australian law is not in doubt. The Commonwealth DPP has in fact brought the prosecution against the accused. It is therefore hypothetical, and beyond the issues presented by the matter, to speculate upon what might happen if the Commonwealth DPP were to decline or omit to perform the functions conferred upon him by State (and Territory) law with the consent of federal law. The sanctions in such a case would seem, at least primarily, to be political and intergovernmental. I would therefore leave this question to be decided in a case where it was necessary to do so. It is not necessary here.

Orders

126 For these reasons, the questions reserved to the Full Court should be answered in the terms proposed by other members of the Court.

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171 cf Rose, "The Bizarre Destruction of Cross-vesting", (1999) 11 *Australian Journal of Corporate Law* 1 at 21; Lam, "Case Note: *Wakim*", (2000) 22 *Sydney Law Review* 155 at 168, 170.

172 *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 at 222-223; *R v Mahony; Ex parte Johnson* (1931) 46 CLR 131 at 145-148; *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 84-88; cf *Acts Interpretation Act*, s 33(2A).